No. 82-6035

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

MANUEL C. QUINTANA,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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January 13, 1983

QUESTIONS PRESENTED

I. Whether the Virginia capital murder statute that provides that the wilful, deliberate and premeditated killing of a person in the commission of robbery while armed with a deadly weapon is capital murder was unconstitutionally applied to petitioner who was not armed and the killing was accomplished by the use of a hammer belonging to the victim.

II. Whether Petitioner was denied due process of law and was subjected to cruel and unusual punishment because his sentence of death rests, in part, upon a jury finding of "dangerous predicate" based solely on statement of a convicted felon concerning petitioner's crimes committed in Cuba, absent any evidence of conviction for a crime in the United States.

III. Whether a state court's application of a procedural rule that inhibits meaningful review of a death sentence violates its own sentencing statute and petitioner's due process rights.

IV. Whether prospective jurors were improperly excluded in violation of Witherspoon requirements and whether the fundamental right of petitioner to an impartial jury is waivable by petitioner's failure to object at his trial.

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TO THE SUPREME COURT OF VIRGINIA

The petitioner, Manuel C. Quintana, respectfully prays for a Writ of Certiorari to the Supreme Court of Virginia to reverse its decision affirming the judgment of the Circuit Court of Arlington County, Virginia, and denying petitioner's request for rehearing.

OPINION BELOW

The judgment and commitment order of the trial court affirming the jury verdict of guilty and the sentence of death is unreported, but is set out in the appendix (See, Appendix A). The opinion of the Supreme Court of Virginia affirming the judgment of the Arlington County Circuit Court is reported at 295 S.E. 2d 643, 243 Va. _____ (1982) and is appended hereto (Appendix B). The Opinion of the Supreme Court of Virginia denying Mr. Quintana's petition for rehearing is unreported, but is set forth in the Appendix (Appendix C).

JURISDICTION

The final judgment of conviction in the Circuit Court of Arlington County, Virginia, was entered on the 4th day of August, 1981 in Commonwealth v. Manuel Quintana, Criminal No. C-17450 (Appendix A). The Judgment of the Supreme Court of Virginia affirming petitioner's conviction was entered on September 9, 1982 in Quintana v. Commonwealth, No. 811845 (Appendix B). The petition for rehearing was denied by the Supreme Court of Virginia on the 15th day of October, 1982 (Appendix C). On December 1, 1982, an extension of time within which to file the instant Petition for Writ of Certiorari was granted upon application to Chief Justice Warren E. Burger, Circuit Justice for the Fourth Circuit (Appendix D).

Said extension was granted to andincluding January 13, 1983. This petition is timely filed. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting in this Court deprivation of rights, privileges, and immunities secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the law.

2) The Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted.

3) Section 18.2-31(d) of the 1950 Code of Virginia, as amended, attached hereto as Appendix E , defining capital murder and fixing the punishment therefor as death.

4) Section 17-110.1 of the 1950 Code of Virginia, as amended, attached hereto as Appendix E , prescribing the scope and manner of review of death sentences in Virginia.

5) Sections 19.2-264.2 to 19.2-204.5 of the 1950 Code of Virginia, as amended, attached hereto as Appendix E-1, defining the terms and conditions of trial of capital cases.

STATEMENT OF FACTS

On March 19, 1981, the body of Ofelia Quintero, a seventy-two year old Cuban refugee, was discovered by neighbors in a pool of blood on the kitchen floor of her apartment at 748 South Florida Street, in Arlington, Virginia, at around 3:20 in the afternoon. She lived with her forty-six year old unmarried son, Nelson Echemendia.

In the afternoon of March 18, 1981, the day before the homicide, Mr. Quintana was released from the Fairfax County Detention Center following the dismissal of the charges against him earlier that day.

The following morning, March 19, 1981, at around 1:00 p.m. Mr. Quintana showed up in Fairfax County Courthouse and talked to a Carmen Salgado, a traffic court clerk who speaks Spanish.

Just before 2:00 p.m., he arrived at the office of Dennis Reed, a used car dealer in Arlington County, Virginia. Dennis Reed sold a 1969 Plymouth Fury to Mr. Quintana for $350.00. According to Reed, Quintana left his office at around 3:00 or 3:15 p.m.

Quintana then returned to his apartment in Falls Church, Virginia, in the evening of March 20, 1981. The apartment was then occupied by another Cuban refugee, Suarez. Suarez later told Quintana that the police were looking for him on suspicion of the murder of Ofelia Quintero. Suarez admitted that Quintana was surprised by this statement. According to Suarez, Quintana said that "he was not leaving this day and that he had no reason to leave." Quintana also asked Suarez to take him to the police. Suarez later professed his confusion, "I did not believe that a person I knew -- I would assume that anyone who had committed a crime would wish to flee."

The following morning, March 21, Quintana woke up at the same time the Suarez children did. Suarez stated that Quintana was

going to "present an application to Seven Eleven [store] in order to begin working there." He helped Quintana fill out the application form in English. Quintana volunteered to take one of the Suarez children to work. The two left the apartment in Quintana's car at about 6:30 or 7:00 a.m. Quintana, according to Suarez, returned about a half an hour or so later and went back to sleep. When Suarez left to do some shopping for groceries at about 9:00 a.m., Quintana was asleep. This was just two hours before his arrest!

On Saturday, March 21, Arlington police officers went to the Falls Church Drive apartment to locate Quintana. When the police officers entered the apartment they encountered the Suarez children and Quintana. Detective Carrig testified that at a certain point Quintana removed a key ring voluntarily and threw the keys on the table beside Detective Carrig. (T-6/3/81, p. 419) The key ring contained a number of keys and a car dealer's tag. Detective Carrig testified that Mr. Quintana was not trying to hide the keys. (T-6/3/81, p. 419) When Detective Carrig noticed the dealer's tag, he went out to the parking lot to look for the car described on the tag. He later found the car described on the tag at the parking lot. The car was impounded and later searched by the Arlington police. Some of the stolen articles were recovered in that car.

The record below reveals that the victim and her son, Nelson, arrived from Cuba on May 21, 1980. They met Manuel Quintana in a refugee camp in Pennsylvania some time in August of 1980. Nelson and his mother had spent a lot of time with Quintana in the camp; Nelson and Quintana played dominoes in the camp. Nelson and his mother eventually left the refugee camp and settled in Arlington County on September 3, 1980.

Shortly after Nelson and his mother moved to Arlington County, a reunion for Cuban refugees was sponsored by the Catholic Church in Arlington a few days before Thanksgiving of 1980. It was on this occasion that they met Quintana again. According to Nelson, his

mother was very happy to see Quintana. She invited him over to their place so he "can help me with my feet," she said. Quintana had told her he was a chiropractor in Cuba.

After that initial meeting, Quintana visited Ofelia Quintero and her son frequently at her apartment in Arlington County. Quintana occasionally took Nelson and his mother for a ride in his automobile. On one occasion, they visited another lady friend by the name of Ofelina Moya. Mrs. Moya later testified on behalf of Quintana at the penalty stage.

On the 19th of March, Nelson said he left his wallet in a dresser drawer in the bedroom. Nelson admitted there were other people who knew he had a lot of money in the apartment: "Some people know I had the money. They didn't know how much, but two or three people had already asked me if I - to put it in the bank . . ."

According to Nelson he last saw his mother alive when he left for work at 6:30 a.m. on March 19, 1981. He also claimed that he had $1,000.00 in his wallet that morning. Although he testified that he always kept his wallet in the drawer, the police found his empty wallet between the mattress of the bed.

Another Cuban refugee, Orlando Dominguez (hereinafter referred to as Orlando), and his roommate lived in an apartment directly above the victim's apartment. Nelson testified that Orlando and his roommate visited his house: "many times they came for lunch." Apparently the relationship soured when Orlando and his roommate failed to pay the bill for long distance telephone calls to Cuba from Nelson's telephone. The bill was about $298.00. After Nelson had confronted Orlando about the matter, Orlando sent Nelson a threatening note asking Nelson and his mother to leave him alone. The note was dated just ten days prior to the date of the homicide.

During the investigation, Det. Gabrielson testified that at one point he noticed that in one of Orlando's cuticles "was a reddish material which I thought to be blood." When the police officers

attempted to remove a scraping off his finger for laboratory analysis, Orlando resisted sc violently that the four or five officers present were not able to remove the scraping.

Although Det. Gabrielson stated that Orland had a good alibi on the 19th of March, he admitted that at that time he did not know the exact time the woman was killed. It was later discovered that his alibi was flawed. Officer Tamer later found out that he was separated from Jaramillo for about twenty minutes. A witness testified that Orlando was seen walking alone on Greenbrier Street, a block away from the victim's apartment, between 2:00 and 2:30 p.m. on March 19. Jaramillo's apartment is only five minutes at normal walking pace away from the victim's apartment.

There was also testimony that blood samples (Exhibit #8) were lifted from Orlando's apartment door, and also in the hallway or stairwell leading to his apartment from the victim's apartment. Officer Nell also testified about a blood-stained pillow case found in Orlando's bathroom.(T-6/3/81, p. 403)

The autopsy revealed that the victim sustained multiple blows primarily to the head. Internal examination revealed extensive skull fracturer in both the left and rights sides of her head.

The medical examiner also testified that there was no sign of sexual abuse of the victim in that the autopsy revealed no injury to the breast or genital area. Nor was there any evidence of sperm present in these areas.

Dr. Sheehey, the Arlington County Medical Examiner, arrived at the scene at 6:15 p.m. and examined the victim. Dr. Sheehey testified that he was briefed by some of the several police officers on the scene. "I was told that around 1:00 someone had been by and seen that the apartment door was closed and that the impression that I had is that whatever happened had happened between that period, between 1:00 p.m. and 2:30 p.m." In his medical report (Exhibit #12-A), he wrote that "she was last known to be alive about 1:00 p.m." and

placed the time of death at 2:00 p.m. (Exhibit #12-A).

On May 29, 1981, after Quintana was arraigned, a conference was held in Judge Russell's office between the Judge, the Commonwealth's attorneys, and defense counsels. The purpose of the conference was to appoint a psychiatrist to examine Mr. Quintana. Mr. Quintana was not present at this conference.

After denying defense counsel's motion for continuance made the week before, the trial began on June 1, 1981, with the empanelling of the jury. Defense counsel's motion to voir dire in smaller groups was denied. The Court excused for cause a total of thirteen jurors who expressed their opposition to the death penalty during voir dire.

Prior to the Commonwealth's calling of Suarez on the stand, a police officer at the request of the Commonwealth Attorney took an Exhibit in evidence (the three-piece suit) out of the courtroom and showed it to Suarez in an adjacent room without the knowledge of the Judge or the presence of defense counsel. Upon learning of this fact, defense counsel asked for mistrial on the case, but the court denied it. The witness later identified the suit in court as the one worn by Quintana on the day of the murder.

After Mr. Quintana rested his case on June 8, 1981, the Commonwealth presented two rebuttal witnesses. One was Carmen Salgado, whose testimony was offered ostensibly to rebut the evidence of the time of death. Over the objection of defense counsel, the court allowed the jury to hear her testimony. She testified that Quintana came to see her looking for an attorney, after seeing an old woman with gashes on her head; that his shirt had blood stains on it. She also testified that Quintana was wearing casual clothes, not a three-piece suit. Defense counsel attempted to introduce surrebuttal evidence to explain Salgado's testimony, but the court refused it.

Towards the end of the Commonwealth's rebuttal arguments,

Quintana rose up to address the court and protest the accusations of the Commonwealth Attorney, who pointed a finger at him while delivering his arguments. (T-6/9/81, p. 1384) When Quintana continued to speak after being warned by the Judge to stop, he was removed from the courtroom by Sheriff deputies. Although this was not the first time Quintana attempted to address the court, defense counsel objected to Quintana's removal from the courtroom.

The jury began deliberations at 4:10 on June 9, 1981. At 8:50 p.m., the jury asked the court whether it was possible to consider a separate murder and robbery charge. (T-6/9/81, pp. 1341-42) After the Judge answered in the negative, the jury returned to deliberate at 9:07 p.m. Thirty-three minutes later, the jury returned a verdict of guilty against Mr. Quintana.

When the jury returned the following day for the penalty proceedings, the Commonwealth presented the testimony of Pedro Castro, who was with Mr. Quintana in Arlington Jail. He testified that Quintana told him he had murdered a man in Cuba. Defense counsel sought to bar this testimony as hearsay, but the trial Judge allowed the testimony as a declaration against penal interest.

In an attempt to mitigate the penalty, Mr. Quintana called Ofelia Moya to the witness stand. Moya, an elderly Cuban refugee, testified that Quintana had been a big help to her around the house; that he took her places in his car; that he was always well-behaved, and good to her daughters. (T-6/10/81, p. 1448)

During the deliberations on the penalty stage, the jury asked the court whether at this stage of the trial they could consider the defendant as <u>absolutely</u> guilty for purposes of the penalty; they also informed the court that they are split six to six "and are grasping for guidance." Defense counsel again demanded a mistrial since the jurors apparently were confused as to the proper standard for a finding of guilt. The court rejected the motion for mistrial. Shortly thereafter, the jury returned a verdict recommend-

ing the death penalty.

The case was referred to the Probation Office for investigation and preparation of a presentence report, and the case was continued to August 3, 1981, for sentencing and post verdict motions.

On August 3, 1981, the trial court received the presentence investigation and report and heard arguments of counsel. Following Mr. Quintana's allocution, the trial judge sentenced Mr. Quintana to "suffer death in the manner provided by law." The court then informed Mr. Quintana of the automatic review of sentence by the Supreme Court of Virginia and, being unable to afford counsel of his own choosing, counsel were appointed by the court for the appeal.

REASONS FOR GRANTING OF THE WRIT

I

The Virginia Capital Murder Statute providing that the wilful, deliberate, and premeditated killing of any person in the commission of robbery while armed with a deadly weapon, is capital murder was unconstitutionally applied to petitioner who was not armed and where the killing was accomplished with the use of a hammer belonging to the victim.

Petitioner was convicted and sentenced to death under a Virginia statute which, in part, provides:

> "The following offenses constitute capital murder, punishable as Class 1 felony:
>
> * * *
>
> (d) the wilful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon;"
> (Sec. 18.2-31(d), Va. Code)

The language of the statute became of critical importance when the evidence of the Commonwealth showed that the petitioner was not armed when he entered the victim's apartment, that victim and petitioner were friends, that they were drinking coffee prior to the murder, and there was no direct evidence of petitioner's prior intent to rob the victim.

Petitioner has argued before the Virginia Supreme Court that "[T]he concept of robbery 'while armed with a deadly weapon' is essentially foreign to Virginia law. Unlike other states with varying degrees of robbery, Virginia has no 'armed robbery' statute." Petitioner concluded that because this Court (Virginia Supreme Court) has not defined the scope of "while armed" - as opposed to "with the use of" - a deadly weapon, and because Virginia has no concept of armed robbery per se, it would be unconstitutional to apply the statute to the case of petitioner where, as here, the evidence was clear that he did not arm himself with a weapon when he came into

the victim's apartment.

Based on the language of the capital murder statute, it seemed to petitioner that the Virginia General Assembly has decided that a killing committed by a person with the use of a hammer seized at the scene of the crime is less reprehensible than a murder committed by a robber who armed himself with an instrument of death in preparation for the robbery. In its Opinion, the Virginia Supreme Court replied: "We do not believe the General Assembly intended to make such obstruse distinctions in degrees of criminal culpability when it selected the offense reserved for the ultimate penalty." (Appendix , Slip Opinion, p. 7-8) On the contrary, this Court has long recognized that "it is a precept of justice that punishment for crimes should be graduated and proportioned to the offense." Weems v. United States, 217 U.S. 349, (1910) at 367.

It is reasonable to assume that there is higher degree of culpability when a person, in preparation for a crime, arms himself with a firearm or a knife. Certainly, one who pre-arms himself has made up his mind to hurt and injure anybody who stands in his way to accomplishing his criminal purpose; whereas one who is without a weapon has the option of running away when met with resistance. A statute prescribing the ultimate penalty of death cannot reasonably include such a wide range of criminal culpability within its coverage without violating this Court's mandate in Furman v. Georgia, 408 U.S. 238 (1972).

The requirement that crimes be described with appropriate definiteness, which has been referred to as fundamental common-law concept, is generally held to be an essential element of constitutional due process of law. In Lanzetta v. New Jersey, 306 U.S. 451 (1939), this Court said:

> No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids. The applicable rule is stated in Conally v. General Construction Co., 269 U.S. 385, at 391: "that the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." (at p. 453; cited with approval in Baggett v. Bullitt, 377 U.S. 360 (1964).

In analyzing the Virginia statute, petitioner submits that the only permissible application of the law is to one who arms himself in preparation for a crime. The dictionary meaning of being armed is to furnish or equip one's self with weapons for offensive or defensive purpose. (See Black's Law Dictionary, Fifth Edition, p. 99) Since petitioner was not armed when he went into the victim's apartment, his conduct is not covered by the proscription of Sec. 18.2-31(d). For if the Virginia legislature intended a broader application, it would have used a more direct language, such as: with the use of a deadly weapon instead of being armed.

However, to the extent that reasonable men will differ as to the meaning of the statute as worded, petitioner submits that said statute is impermissibly vague and ambiguous.

The wording of the Virginia capital murder statute suffers from other ambiguity: Does the phrase "while armed with a deadly weapon"refer to the killing or to robbery? If it refers to the robbery, does the Virginia legislature limit capital murder to the killing in the commission of armed robbery? If so, then the killing in the commission of "strong arm robbery" would not be covered by the statute.

Crimes are not to be created by inference and may not be

constructed nunc pro tunc; a penal statute must set up ascertainable standards. To satisfy constitutional due process, it is required that the language of penal statutes, when measured by common understanding and practices, give adequate warning of the conduct proscribed. Necessarily, this requirement is heightened when the ultimate penalty is prescribed for its violation.

Petitioner submits that the Virginia capital murder statute does not give adequate warning to all persons as to what particular conduct is proscribed.

II

Petitioner was denied due process of law and was subjected to cruel and unusual punishment because his sentence of death rests, in part, upon a jury finding of the "dangerousness" predicate based solely on the statements of a convicted felon concerning petitioner's crimes in Cuba, and absent any record of conviction for any crime in the United States.

At the sentencing phase of petitioner's bifurcated trial, the Commonwealth introduced testimony of a witness to whom petitioner allegedly made certain statements about his past criminal conduct while both were waiting for trial in Arlington County Jail. According to the witness (Castro), petitioner stated that "he killed a man" in Cuba by cutting his throat; that petitioner was in jail at the time for "carrying off a girl" and raping her; that he had planned "to carry off a girl again" from a junior high school in Virginia; that "he had a house" in Virginia in which to keep hostages "that he picked up"; and that when petitioner was released from jail he planned to "grab" a specified individual. (See Appendix B , Quintana Slip Opinion, p. 16). That was Commonwealth's entire case to prove the "dangerousness predicate" in order to justify the death penalty.

Petitioner did not testify at his trial or at the sentencing phase. The Commonwealth did not introduce any official

record of conviction from Cuba or any criminal conviction in the United States; no witness testified as to any crime petitioner may have committed in the United States. In short, there was no corroboration of petitioner's alleged statements to Castro, the witness.[1]

At the trial, petitioner objected to the testimony of Castro on the ground that said statements constitute inadmissible hearsay evidence. The trial court, however, admitted the statements as an admission by a party in interest. Petitioner argued unsuccessfully his objection before the Virginia Supreme Court.

Although the issue is ostensibly a matter of Virginia evidentiary law, there comes a point at which the evidence being introduced in support of a death penalty case implicates Eighth Amendment and Fourteenth Amendment values as well. In addition to the problem of the right of confrontation and therefore of the hearsay nature of these statements (presumably a Sixth Amendment violation), the Commonwealth used petitioner's statements as the only evidence of a prior violent conduct to support the "dangerousness" predicate in order to justify the death penalty.

It is a fundamental premise in our system of criminal justice, that the defendant's own statements cannot be used to establish the corpus delicti of the offense charged. Petitioner submits that the corpus delicti at capital sentencing in a bifurcated trial of a capital murder includes establishing prior violent conduct, where the state predicates its demand for the death penalty upon defendant's future dangerousness.

Under Virginia statute, the "penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior

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[1] The presentence report submitted in court did not contain any record of criminal convictions.

history of the defendant . . . that he would commit criminal acts of violence that would constitute a continuing serious threat to society . . ." (Sec. 19.2-264.4(c), underscoring added). This is the same high standard of proof that the Commonwealth must meet to prove defendant's guilt at his trial. Citing, Addington v. Texas,[2] this Court in Bullington v. Missouri, stated.

> The state's use of this standard indicates that, as has been said generally of the criminal case, "the interest of the defendant are of such magnitude that . . . they have been protected by standard of proof designed to exclude as nearly as possible the likelihood of any erroneous judgment . . . [O]ur society imposes almost the entire risk of error upon itself." 451 U.S. 430, (1981) at 441.

On any matter as to which the Commonwealth has the burden of proof beyond a reasonable doubt, those matters may be taken to be "elements" of the offense under the analysis in Mullaney v. Wilbur, 421 U.S. 684, (1975) and In re Winship, 397 U.S. 358, (1970).

Petitioner submits that any matter that constitutes an element of the offense is properly a matter on which the statements of the defendant, by themselves, should be insufficient to establish the corpus delicti. Therefore, petitioner may not properly be found to be a threat to society because of his criminal background, where details of this criminal background came only from his own statements.

Just as it violates due process to convict an accused based on insufficient evidence under Jackson v. Virginia, 443 U.S. 307, so would it violate this Court's mandate in Jackson and Bullington to impose the death penalty on insufficient evidence.

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[2] 441 U.S. 418, at 423-424 (1979)

III

The Virginia Supreme Court's application of a procedural rule that in effect bars a meaningful review of a death sentence violated its own sentencing statute and petitioner's due process rights.

On appeal before the Virginia Supreme Court, petitioner argued that the jury's penalty verdict was ambiguous "and therefore violated his constitutional right to a unanimous verdict." Two state justices agreed stating that "commutation is a constitutional and statutory imperative" in this case. However, the majority refused to consider this argument on appeal on the ground that petitioner had not preserved the issue at his trial nor raised it by assignment of error on appeal.

Petitioner supports the view of the dissenting justices that "the majority misconceives the nature and scope of appellate review of the death penalty."

The language of Sec. 17-110.1 leaves no room to doubt that it is mandatory: it provides, in part -

> "17-110.1 A. A sentence of death, upon the judgment then becoming final in the circuit court, shall be reviewed on the record by the Supreme Court.
>
> * * *
>
> C. In addition to consideration of any errors in the trial enumerated by appeal, the Court shall consider and determine:
>
> 2) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> F. Sentence review shall be in addition to appeal, if taken, and review and appeal may be consolidated . . ." (emphasis added)

The only logical conclusion from the clear mandatory language of this provision is that the Legislature has removed from the defendant, in capital cases, the burden of raising the issue or issues to be reviewed by the Court as it concerns sentencing. The Court has a duty to review all death sentences, even where a particular defendant not only acquiesce to the verdict but also accepts

the death sentence!

In Gregg v. Georgia (428 U.S. 153, 1976), Justice Stewart observed that correction of arbitrary sentences was rendered more likely by the statute's mandatory appellate review provisions. At p. 198. It is, however, in Woodson v. North Carolina (428 U.S. 280, 1976) that this Court articulated its sentencing requirements for capital cases. After Woodson, consideration of mitigating and aggravating circumstances becomes a "constitutional imperative." In addition, Woodson established the "fundamental respect for humanity" rationale as an independent ground for requiring individualized capital sentencing procedures. (Woodson, at p. 304)

The record shows that in the case of Mr. Quintana the jury returned a verdict in the alternative form. Although the Commonwealth attempted to prove both the "vileness predicate" and "the dangerousness predicate," the jury only found one, but did not indicate which one.

The minority opinion was correct in stating that a verdict stated in the alternative prevents the Court from conducting a meaningful disproportionality analysis mandated by Sec. 17-110.1, since the Court cannot determine upon what finding or findings defendant's death penalty was predicated. Thus, the State Supreme Court cannot identify "similar cases" for purpose of comparison.

Sec. 17-110.1 provides for a mandatory review procedure that asks the Court to "consider and determine: . . . whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, . . ." As the minority opinion in the Quintana case pointed out, "For proper disproportionality analysis, 'similar cases' are those in which penalties were based upon the same predicate (or predicates) as that underlying the penalty under review." (Appendix B-1, p. 3, dissenting opinion, citation omitted) The dissent pointed out that because this Court cannot determine upon what finding or findings defendant's death penalty was predicated,

this Court "cannot identify similar cases for purpose of comparison. Hence we are unable to determine whether his penalty is excessive or disproportionate." (Appendix B-1, p. 4, dissenting opinion) Since effective sentence review is prevented by the form of the verdict returned by the jury, the majority opinion's procedural ruling (note 6, p. 17, Majority Opinion) when applied to the "disproportionality inquiry" violates the statutory command of Code Sec. 17-110.1.

The imposition of the death sentence, based on an ambiguous verdict that prevented a meaningful disproportionality analysis also violates Mr. Quintana's due process rights. In his dissent in McGautha v. California (402 U.S. at 248-312, Brennan, J. dissenting), Justice Brennan stated that due process first requires that individuals be protected from the arbitrary exercise of state strength, in that state policies underlying the exercise of power are made by "some responsible organ of government." At p. 270. The second due process concern is that meaningful appellate review not be frustrated by obfuscatious procedure. At p. 267 (citing Louisiana v. U.S., 380 U.S. 145, 1965).

The Virginia Supreme Court correctly stated the rule in a recent case, Fitzgerald v. Commonwealth, Va. 292 S.E. 2d, 798 that the waiver rule does not apply to the penalty review mandated by Code Sec. 17-110.1(c). The Virginia Court then said:

> "Although he assigned it as an error, Fitzgerald did not argue in brief or before us that the sentence of death imposed upon him was excessive or disproportionate. Nevertheless, under mandate of Code Sec. 17-110 (c) it is our duty to consider and determine this question . . . " (p. 27 slip opinion, underscoring added)

In applying the procedural bar of Virginia Supreme Court Rule 5:21 in the case of Mr. Quintana, the Court claims "there was not only acquiescence but also affirmative ratification of the verdict form by the defendant, both before the form was tendered

to the jury and after the verdict was returned." (Appendix B, note 6, p. 17) However, if Sec. 17-110.1 is truly mandatory - as it should be in order to pass constitutional muster - then the degree of acquiescence or extent of waiver by defendant is irrelevant.

It is not enough, however, that the standards and procedures set forth under Virginia capital sentencing statute be found to conform to the commands of Furman v. Georgia (408 U.S. 238, 1972) that the death penalty not be imposed capriciously or in a freakish manner. Appellate review of death sentences itself must not be done capriciously or in a freakish manner. In Zant v. Stephens, (50 U.S.L.W. 4422, 31 Crl 3035, May 4, 1982), this Court explained:

> "We recognized that the constitutionality of Georgia death sentences ultimately would depend on the Georgia Supreme Court construing the state and reviewing capital sentences consistenly with this concern . . . Our review of the statute did not lead us to examine all of its nuances . . ." (31 Crl 3036)

In Zant, this Court was asked to decide "whether a reviewing court constitutionally may sustain a death sentence as long as at least one of a plurality of statutory aggravating circumstances found by the jury is valid and supported by the evidence." (Id. p. 3036) Despite the clarity of the Georgia rule, the Court majority finds "considerable uncertainty" about its premises, which the state court has never explained. It would therefore be "premature," the majority opinion says, to decide whether the reasons for the rule "might undermine the confidence we expressed in Gregg v. Georgia, 428 U.S. 153 (1976), that the Georgia capital sentence system, as we understood it then, would avoid the arbitrary and capricious imposition of the death penalty and would otherwise pass constitutional muster." (31 Crl 3036)

IV

Prospective jurors were improperly and unconstitutionally excluded in violation of Witherspoon requirements despite petitioner's failure to object to their excusal, since right to an impartial jury is a nonwaivable and fundamental right of an accused.

The standard developed by this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968) rhrg. denied, 393 U.S. 898 (1968), for excluding prospective jurors who oppose the death penalty is a very strict one: Only jurors who are unequivocally opposed to the imposition of the death penalty may be excluded for cause. Applying this standard in Boulden v. Holman, 394 U.S. 478 (1969), and Maxwell v. Bishop, 398 U.S. 262 (1970), this Court disallowed exclusion of veniremen who had not unequivocably stated that they would refuse to vote for the imposition of the death penalty in any case.

Thus, in two successive terms after Witherspoon, this Court firmly established the Witherspoon rule to be that no veniremen may be constitutionally excluded from a jury unless he is unambiguously and categorically unwilling to consider the imposition of the death penalty in any case, no matter what the facts.

On June 28, 1981, this Court applied the holdings in Boulden and Maxwell to vacate several death sentences where excluded veniremen had stated that they did not believe in the death penalty but had not unequivocally stated that they would refuse to vote for its imposition regardless of the evidence presented at trial. Ladetto v. Massachusetts, 403 U.S. 947 (1971); Turner v. Texas, 403 U.S. 947 (1971); Segura v. Patterson, 403 U.S. 946 (1971); Pemberton v. Ohio, 403 U.S. 947 (1971); Funicello v. New Jersey, 403 U.S. 948 (1971).

In reviewing the excusal of scrupled prospective jurors for cause under the Witherspoon v. Illinois, supra, it must be remembered that Witherspoon requires that the juror make his

categorical opposition to the death penalty "unmistakably clear." It cannot be said from the record of this case that excused veniremen Lee, Steigleman, McKenna, Hickey, Loucas, Gray, Matticole, Welch, Bishop, Kelley, Lesse made their views "unmistakably clear", for the Judge never specifically instructed them during voir dire that the law requires a juror to "subordinate his personal views to what he . . . (perceives) to be his duty to abide by his oath as a juror and to obey the law of the State" (391 U.S. at 514-515, n. 7). As this Court noted:

> Obviously many jurors "could, notwithstanding their scruples (against capital punishment), return . . . (a) verdict (of death) and . . . make their scruples subservient to their duty as jurors."

None of the thirteen veniremen excused for cause by the trial Judge in the Quintana case were asked whether despite their views on capital punishment, they could abide by the law and the instructions of the Judge. They were therefore prematurely excused, with the showing required by Witherspoon for disqualification incomplete.

This Court in Adams v. Texas, 448 U.S. 38 (1980), squarely reaffirmed the Court's holding in Witherspoon: the states may not exclude prospective jurors for cause in capital cases merely because they have "conscientious scruples against or were otherwise opposed to capital punishment." 65 L.Ed, 2d 581 at 588. Adams also reiterated the test set forth in Witherspoon that "if prospective jurors are barred from jury service because of their views about capital punishment on "any broader basis than inability to follow the law or abide by their oaths, the death sentence cannot be carried out."

The Virginia Supreme Court, however, did not address this issue, preferring instead to infer waiver of this objection under Rule 5:21 of the Rules of the Virginia Supreme Court. While Rule 5:21 has been applied by the Virginia Supreme Court in many cases, notably on the question of admissibility of evidence, the state court

has had no occasion to apply the waiver rule against loss of constitutional rights.

While the question of waiver must depend in each case, upon the particular facts and circumstances surrounding that case, "court must indulge every reasonable presumption against the loss of constitutional rights," Illinois v. Allen, 397 U.S. 337, 343 (1970), rhrng, denied, 398 U.S. 915 (1970).

This Court has implicitly held that error under Witherspoon v. Illinois, supra., is fundamental and cannot be waived. Jury selections in violation of Witherspoon "necessarily undermines . . . 'the very integrity of the . . . process'" leading to the imposition of the death sentence. Id. at 523 n.22. Moreover, this Court has reversed a number of death sentences (see, e.g. Boulden v. Holman, supra; Maxwell v. Bishop, 398 U.S. 262 (1970); Wigglesworth v. Ohio, 403 U.S. 947 (1971); and Harris v. Texas, 403 U.S. 947 (1971) despite lack of a contemporaneous objection to Witherspoon violation.

CONCLUSION

For all the above reasons, and in the interest of justice and due process of law, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Virginia affirming the conviction and sentence of death imposed upon petitioner by the Circuit Court of Arlington County, Virginia.

Respectfully submitted,

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January 13, 1983

COMMONWEALTH OF VIRGINIA

C-17450

VS

MANUEL QUINTANA

THE 3rd day of August, 1981 came the Commonwealth of Virginia, by its Attorney, Kenneth Nelson, the Probation Officer for the Circuit Court of Arli ton County, Virginia, the Defendant in custody of the Sheriff and his Court Appointed Attorneys, Benjamin N.A. Kendrick, Jose Recinto and Domingo Ordovez

It appearing to the Court that the Defendant was previously found "Gui of "Capital Murder", this case was continued to this date for the imposition sentence and the hearing of post-trial motions.

WHEREUPON this case came on to be heard on the Defendant's motion for judgment of acquittal or new trial and motion to vacate on the ground of an unconstitutional statute, and the said motions were argued by counsel.

UPON CONSIDERATION WHEREOF it is the opinion of the Court that the sai motions should be, and they hereby are, denied as are more specifically set forth in the stenographic record of this case.

WHEREUPON the Defendant was asked if he had read and understood the report of the Probation Officer, which was presented in open Court pursuant to Section 19.2-299 of the Code of Virginia, and further if he had discussed the report with his counsel, to all of which the Defendant replied in the affirma

THEREUPON the Attorney for the Defendant was asked if he desired to ha the Probation Officer or any other witness sworn to testify regarding the matt before the Court, to which the Attorney for the Defendant replied in the affi tive.

WHEREUPON the Court ordered that the report of the Probation Officer be filed as a part of the record in this case after certain discrepancies were noted therein, as are more specifically set forth in the stenographic record of this case, and the Defendant cross-examined the investigating officer, who was duly sworn as the law directs immediately prior thereto, and the Defendant and the Commonwealth introduced other evidence pertaining to the proceedings herein.

AND IT BEING DEMANDED of the accused if he desired to make a statement or to advance any reason why judgment should not be pronounced against him according to law, both he and his counsel made statements to the Court.

WHEREUPON the Court being of the opinion that the verdict of the jury is right and proper, doth hereby find the Defendant guilty of "Capital Murder" as charged in the indictment herein.

IT IS ACCORDINGLY the Judgment of this Court, pursuant to the verdict of the jury, that the said Manuel Quintana be, and he hereby is, sentenced to Death as provided by law.

IT IS FURTHER ORDERED by the Court that the execution of the sentence herein imposed be, and it hereby is, suspended pending action of the Supreme Court of Virginia as provided in Section 17-110.1 of the Code of Virginia.

THEREUPON, the Defendant having been found to be indigent, the Court Appointed Benjamin N.A. Kendrick, Jose Recinto, and Domingo Ordoveza, discreet and competent Attorneys, to represent him for the appeal of this case.

BE IT REMEMBERED that Commonwealth's Exhibit #1 from the sentencing herein was returned to the Arlington County Sheriff Department.

Recorded in Common Law Order
Criminal Book No. 13 Page No. 336
On August 1 1981

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IT IS FURTHER ORDERED by the Court that as soon as possible after the entry of this order, the Defendant be removed and safely conveyed according to law from the Jail of this Court to the Penitentiary of this Commonwealth; therein to be kept, confined and treated in the manner provided by law.

THE COURT ORDERS that the Defendant be allowed credit for the time spent in jail awaiting trial, namely since March 21, 1981.

THE COURT CERTIFIES that at all times during the trial of this case the accused was assisted by an interpreter duly sworn and qualified as provided by law and further certifies that at all times during the trial of this case the accused was personally present with the exception that he was removed during a portion of the Commonwealth's closing argument at trial due to disruptive behavior as more specifically set forth in the stenographic record of this case.

THE birth date of the Defendant is reported to be February 8, 1953.

AND the Defendant is hereby remanded to jail.

Entered this 4th day of August, 1981.

Charles L. Russell
Judge

PRESENT: Carrico, C.J., Cochran, Poff, Compton, Thompson, and Stephenson, JJ., and Harrison, Retired Justice.

MANUEL C. QUINTANA

v. Record No. 811845

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE A. CHRISTIAN COMPTON
September 9, 1982

FROM THE CIRCUIT COURT OF ARLINGTON COUNTY
Charles S. Russell, Judge

This is an automatic review of a death sentence and the underlying conviction of capital murder in the commission of robbery while armed with a deadly weapon.

The victim of the crime, Ofelia Quintero, a 72-year-old native of Cuba, was killed by multiple hammer blows to her head, neck, and back. Numerous articles missing from her Arlington apartment were discovered in a search of a car owned by Manuel C. Quintana. Quintana, a Cuban native who speaks no English, was arrested, charged with capital murder, and, in a bifurcated trial, convicted and sentenced by a jury to death. The trial court confirmed the verdict. Defendant asks us to reverse his conviction or, in the alternative, to commute his sentence to life in prison.[1]

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[1] Defendant assigns 28 errors. Several, never addressed on brief or in oral argument, are taken as waived. Others, argued on brief, were not preserved by contemporaneous objection at trial. One issue argued on brief was neither properly preserved nor raised by assignment of error. Another rests upon arguments advanced for the first time in this Court. Applying Rules 5:20(b) and 5:21 in accord with repeated precedent, we will not notice such matters. Whitley v. Commonwealth, 223 Va. 66, 76, 286 S.E.2d 162, 168 (1982); Clanton v. Commonwealth, 223 Va. 41, 55, 286 S.E.2d 172, 179 (1982). See also Engle v. Isaac, U.S. (1982).

Defendant considers the death penalty cruel and unusual punishment per se and asks us to declare Virginia's capital murder statutory complex unconstitutional on its face. Advancing no other reason, he "reasserts here those arguments . . . which heretofore have been raised and rejected by this Court." We adhere to our former decisions.

I. PRE-TRIAL MOTIONS

A. Motion to Postpone Trial

One week before trial, defendant asked the trial court to grant him "more time" to search for alibi evidence. He was unable to name any witness or give the court assurance that any could be found. The trial court denied the motion but appointed an investigator and authorized expenditure of state funds to finance an investigation of certain records located in the state of Texas which counsel thought might be material.

As defendant concedes, whether a trial should be postponed lies within the sound discretion of the trial judge. Ungar v. Sarafite, 376 U.S. 575, 589 (1964); Shifflett v. Commonwealth, 218 Va. 25, 30, 235 S.E.2d 316, 319 (1977). Defendant contends that denial of his motion was an abuse of discretion. We disagree.

An attorney was appointed to represent defendant at the preliminary hearing held March 23, 1981, two days after his arrest. On April 23, the court appointed two additional attorneys, both versed in the Spanish language. The record shows that, before trial began, defense counsel had interviewed prospective witnesses, examined the Commonwealth's demonstrative evidence, and otherwise investigated and prepared defendant's case with great diligence and professional skill. After working together for nearly six weeks, the three attorneys were unable to identify any evidence not already explored, other than the documentary evidence in Texas. To pursue that lead, the trial court employed an investigator at public expense, an act of judicial grace not constitutionally required. Martin v. Commonwealth, 221 Va. 436, 446, 271 S.E.2d 123, 129-30 (1980

Defendant has shown no prejudice resulting from what he claims was an abuse of discretion, and we will affirm the trial court's ruling. Rosenberger v. Commonwealth, 159 Va. 953, 957, 166 S.E. 464, 465 (1932).

B. Motion to Suppress

The property stolen from the victim's apartment was seized pursuant to a search warrant. The search, the seizure, the warrant, and the supporting affidavit were regular in all respects save one. The issuing magistrate failed to certify the affidavit before he filed it with the clerk of the court, and defendant contends that the trial court should have excluded the evidence seized in the search.

Code § 19.2-54 provides that the affidavit

> "shall be certified by the officer who issues such warrant and delivered . . . to the clerk . . . within seven days . . . .
>
> "Failure . . . to file the required affidavit shall not invalidate any search . . . unless such failure shall continue for . . . thirty days. . . ."

The magistrate filed the affidavit timely, and defendant does not challenge the finding of probable cause. Rather, he urges us to announce and apply an exclusionary rule which he believes the statute mandates. The premise of his argument is that an uncertified affidavit is not "the required affidavit". Hence, he concludes, if the statute expressly provides that failure to certify the affidavit does not invalidate a search unless the failure continues for 30 days, the statute necessarily implies that when, as here, the failure continues beyond that time, the search is invalid even if conducted the day the affidavit is filed.

We do not accept the premise, and we reject the conclusion. Having in mind the Fourth Amendment purposes the statute was designed to foster, we believe "the required affidavit" means the affidavit required to support issuance of a search warrant. Under the Fourth Amendment warrant requirement, the content of that affidavit must be sufficient to support a finding of probable cause by a neutral and detached magistrate. The constitution does not require the magistrate to certify an affidavit. The purpose of that requirement in our statute is to insure that the affidavit filed with the clerk for the information of the accused is the same

affidavit upon which the finding of probable cause was based. At the suppression hearing, the affiant identified the challenged affidavit as the one he subscribed before the magistrate.

Finding that the statutory purpose was fully served and that the omission of the magistrate's signature in the jurat caused defendant no prejudice, we hold that the trial court properly overruled defendant's motion to suppress.

II. THE GUILT TRIAL

A. Sufficiency of the Evidence

The Commonwealth produced no eye-witness to the crime, and defendant maintains that the evidence was insufficient to prove that he committed capital murder. We review the evidence in the light most favorable to the Commonwealth.

On March 19, 1981, at approximately 2:30 p.m., the victim's body was found lying face-down in a pool of blood on the floor of her kitchen. Nearby walls and a radiator were splattered with blood. An autopsy revealed 13 discrete lacerations of both sides and back of the head. The skull was exposed and fractured in 11 places. There were five crescent-shaped contusions on the shoulder blades and back and an undeterminable number of bruises on the back of the neck. Any but two of the head wounds could have been fatal. The body was fully clothed, and there was no evidence of sexual abuse. The time of death might have been as early as 8:00 a.m. or as late as 2:30 p.m. Hair and blood samples identified a carpenter's hammer as the murder weapon.

The small apartment, occupied by the victim and her son, Nelson Echemendia, had been ransacked. Numerous items of jewelry, clothing, and other personal goods, including a cord torn from a telephone, were missing. Two days after the crime, the stolen property was discovered in defendant's car.

The apartment showed no signs of forced entry or a struggle. A coffee pot was on the stove, coffee cups and a water jug were on the table, and an extra chair was in the kitchen. Defendant's fingerprints were lifted from the water jug and from a camera.

Echemendia testified that the camera had been inside its case when he left for work the morning of the crime and that, prior to that day, defendant had had no occasion to touch the camera.

Echemendia testified that defendant was a social acquaintance he and his mother had met in a Cuban refugee camp in Pennsylvania. Defendant had been a visitor in their apartment, and on one occasion had used Echemendia's hammer, the murder weapon. Defendant was aware that Echemendia was saving money for a trip to Florida. Echemendia had saved approximately $1000, mostly in twenty-dollar bills, which he kept in a wallet in the apartment. He also kept the identification card issued by the Immigration and Naturalization Service in his wallet. The card was among the articles found in defendant's car.

The day before the crime, defendant had been released from jail in Fairfax County with only 15 cents in his pocket. At 2:00 p.m. on the day of the crime, he appeared at a used-car lot wearing a hat similar to one missing from the apartment. He bought a car for $350 and paid the salesman in twenty-dollar bills. Later that day and the next, defendant made cash expenditures of more than $250. At the time of his arrest on March 21, he had $162 on his person.

The Commonwealth introduced as an exhibit a beige, three-piece suit defendant was seen wearing the day of the crime.[2] The suit had "blood splatters on the sleeves" and "on the lower front portion of both legs of the pants." Forensic analysis showed that the blood type was consistent with that of both the defendant and the victim.

Shortly after 1:00 p.m. on the day of the crime, defendant appeared in the office of the clerk of the General District Court

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[2] This was shown by the testimony of Caunabot Suarez with whom defendant had spent the previous night. Before Suarez took the stand, the Commonwealth's Attorney removed the suit from the courtroom and showed it to the witness. Defense counsel moved for a mistrial. The trial court overruled the motion, and counsel cross-examined the witness at length.

We agree with the trial court that trial exhibits are public records open to inspection by counsel, jurors, and witnesses alike. Defendant does not contend, and there is nothing of record to show, that the exhibit was altered or that the witness was coached to give false testimony, and we find no merit in defendant's complaint

of Fairfax County. Carmen Salgado, a deputy clerk fluent in the Spanish tongue, testified that defendant "asked me help him to find his attorney," who had represented him in court the previous day. Salgado "asked him what the nature of the problem was" and "he started telling me his story." Defendant said that he had found an old lady "injured at the bottom of the stairs" with gashes "[o]n the upper part of her body, her head." Defendant explained that he had not called the police because "he was scared and that he ran." Salgado tried, unsuccessfully, to call an attorney at a number defendant had written on a piece of paper. Salgado advised defendant "not to run" and that "[i]f he was innocent, then I would help him." Before defendant left, Salgado noticed "two drops of blood on his shirt."[3]

We consider defendant's sufficiency challenge in its several parts.

1. Elements of Capital Murder

a. Intent to Steal

In answer to a question propounded by the jury, the trial court announced that counsel had agreed that the killing and the robbery had been committed by the same person. Yet, defendant contends on brief that there was no evidence to prove "his intent to steal at the time of the killing". We cannot agree.

A similar contention was made in Whitley v. Commonwealth, 223 Va. at 72, 286 S.E.2d at 166. Here, as there, we look to the events and circumstances surrounding the crime to determine whether they fairly support the conclusion that the motive for the murder was theft from the person or the dominion of the victim.[4] Defendant had only 15 cents when he was released

[3] Salgado's testimony was introduced by the Commonwealth on rebuttal over defendant's objection. Defendant proffered surrebuttal testimony of defendant's attorney to show why he was looking for a lawyer. The trial court excluded the testimony. Defendant assigns error to both evidentiary rulings. As we will explain in part II A 2 b, infra, we do not believe these rulings constitute reversible error.

[4] Here, as in Whitley, we need not decide whether Code § 18.2-31 (d) requires the Commonwealth to prove intent to steal at the time o the killing.

from the Fairfax jail the day before the crime, and he had no job. Defendant knew that the victim's son was saving money for a trip. Within hours after the killing, defendant paid for a car with bills of the same denomination as the money missing from the victim's apartment. Two days later, other property taken from the apartment was found in that car. The arrangement of the extra chair, water jug, coffee pot, and cups and the lack of evidence of a struggle or sexual abuse indicate that the only purpose of the killing was to facilitate the theft. "Criminal intent, a state of mind, may be, and often must be, shown by circumstantial evidence." Id. at 73, 286 S.E.2d at 166.

b. Armed with Deadly Weapon

In one assignment of error, defendant maintains that the "statute is unconstitutional as applied". The burden of the argument addressed to this assignment is that the evidence is insufficient to prove that the killing was committed "while armed with a deadly weapon", Code § 18.2-31(d), and that any doubt about the meaning of those words should be resolved in his favor. "The pivotal issue," he asserts, "is whether the use of the hammer which was not carried by the defendant satisfies the [statutory] requirement . . . ".

Amplifying his argument, defendant says that under our statute "capital punishment was reserved . . . for . . . the 'most reprehensible crimes'"; that the language the legislature chose must be construed and applied strictly; that "'armed' connotes the carrying of a weapon and not its mere usage"; and that a hammer is not a deadly weapon within the contemplation of the statute under which he was convicted.

As we understand his argument, defendant contends that the General Assembly has decided that a murder committed by a robber with a hammer seized at the scene of the crime is less reprehensible than a murder committed by a robber with a knife carried on his person. We do not believe the General Assembly intended to make such abstruse distinctions in degrees of criminal

culpability when it selected the offenses reserved for the ultimate penalty.

Subsection (d) was added to the capital murder statute by Acts 1976, c. 503. In two cases decided prior to that enactment, Floyd v. Commonwealth, 191 Va. 674, 684, 62 S.E.2d 6, 10 (1950); and Pannill v. Commonwealth, 185 Va. 244, 254, 38 S.E.2d 457, 462 (1946), we quoted with approval the definition of "deadly weapon" stated in 40 C.J.S., Homicide § 25 which reads in part:

> "'A deadly weapon is one which is likely to produce death or great bodily injury from the manner in which it is used, and whether a weapon is to be regarded as deadly often depends more on the manner in which it has been used than on its intrinsic character. . . .'"

See also Pritchett v. Commonwealth, 219 Va. 927, 929, 252 S.E.2d 352, 353 (1979); Cox v. Commonwealth, 218 Va. 689, 691, 240 S.E.2d 524, 526 (1978).

When the General Assembly enacts a statute in language with a long history of definition by this Court, we believe it intends that the words carry their historical construction. Considering the character of the tool introduced as an exhibit in this case, the manner in which it was used, and the results of its use, we hold that the hammer was a deadly weapon within the intendment of the statute.

In defendant's view, a person is not "armed" with a weapon in the criminal sense of that word unless he acquires it and carries it upon his person for some interval of time (for how long, he does not suggest). In our view, a person is criminally armed from the moment he seizes a weapon with intent to use it for a criminal purpose.

We conclude, therefore, that the statute was not unconstitutionally applied to the facts in this case.

2. Time of Death and Defendant's Alibi

a. Medical Examiner's Report

The uncontradicted evidence shows that defendant appeared at the clerk's office shortly after 1:00 p.m. and at a used-car lot

at 2:00 p.m. Defendant offered in evidence the written report of the medical examination conducted in the late afternoon of the same day. Fixing the time of death at 2:00 p.m., the report stated that the body had been discovered at 2:30 p.m. and that the victim "was known to be alive about 1:00 p.m." Over defendant's objection, the trial court deleted this statement as hearsay. Defendant says that this statement was crucial to his alibi defense and assigns error.

Defendant called Dr. Sheehy, the medical examiner, and interrogated him about the statement. The witness testified that the police had informed him that a neighbor had observed that the victim's apartment door was closed at 1:00 p.m. and that the body had been discovered at 2:30 p.m. Dr. Sheehy explained that, based upon this information, "the impression I had is that whatever happened had happened between that period, between 1:00 p.m. and 2:30." Cross-examined by the Commonwealth, Dr. Sheehy said that his medical findings "would be consistent with the death from as early as 8:00 to 10:00 o'clock in the morning".

As appears from the face of the written report, and as explained by the examiner's testimony, the deleted statement was a conclusory opinion induced by hearsay. Reports of the medical examiner introduced pursuant to Code § 19.2-188 are prima facie evidence of the facts stated therein. Bass v. Commonwealth, 212 Va. 699, 700, 187 S.E.2d 188, 189 (1972). But an opinion in such a report is not competent evidence, Ward v. Commonwealth, 216 Va. 177, 178, 217 S.E.2d 810, 811 (1975) (cause-of-death opinion), and we find no merit in this assignment of error.

b. Rebuttal and Surrebuttal Testimony

Defendant assigns error to two additional evidentiary rulings related to his alibi defense. The testimony of Carmen Salgado, the deputy clerk, was introduced by the Commonwealth after defendant had rested his case. Defendant protests that the Commonwealth "introduced new matters" which "could have been introduced in its case in chief."

Salgado testified that defendant came to the clerk's office shortly after 1:00 p.m. on the day of the crime; that he was looking for his lawyer because he had just found an elderly lady with gashes on her head and body; and that she noticed blood on his shirt. The time of death did not become a significant circumstance until Dr. Sheehy was examined in defendant's case in chief. Salgado's testimony was offered to contradict any inference raised by Dr. Sheehy's testimony that the victim was alive at 1:00 p.m.

We agree that Salgado's testimony might more appropriately have been introduced as part of the Commonwealth's case in chief. But we leave the order of proof in a criminal case to the sound discretion of the trial court, Hargraves v. Commonwealth, 219 Va. 604, 608, 248 S.E.2d 814, 817 (1978), and we will not disturb the ruling here.

In response to Salgado's testimony that defendant had said he was looking for the lawyer who had represented him on March 18 the day he was released from the Fairfax jail, defendant ...ed that the attorney would testify that he had instructed his client to contact him the next day. Observing that the proffered testimony was only "an added reason" why defendant was trying to find his lawyer the day of the crime, the trial court disallowed the evidence.

Absent an abuse of discretion, appellate courts uphold a trial court's decision whether to admit surrebuttal evidence. See, e.g., State v. Ward, 284 S.E.2d 881 (W.Va. 1981); Gregory v. United States, 393 A.2d 132 (D.C.Ct.of App. 1978); State v. Mays, 65 Wash.2 58, 62, 395 P.2d 758, 762, (1964), cert. denied, 380 U.S. 953 (1965) State v. Blanton, 111 Ohio App. 111, 120, 170 N.E.2d 754, 760 (1960) Unless it is merely cumulative, surrebuttal evidence is admissible if it contradicts or alters the import of material evidence introduced for the first time in rebuttal. See 6 Wigmore, Evidence §§ 1873-74 (Chadbourn rev. 1976). The import of Salgado's testimony was material to rebut defendant's theory that Quintero was still

alive after 1:00 p.m. While the proffered surrebuttal may have shown that defendant had an innocent reason to contact the attorney who had been representing him, proof of that reason does not contradict the incriminating inference raised by the circumstances detailed in Salgado's testimony.

At most, the proffered testimony would have supplied "an added reason" underlying one of the several circumstances from which the incriminating inference springs. While we do not agree with the Attorney General's position that this testimony was inadmissible, we find no abuse of discretion in the trial court's ruling.

3. Different Criminal Agent

Defendant suggests that the evidence supports his hypothesis that Orlando Dominguez, who lived with a friend in an apartment above the victim's apartment, was the criminal agent. Dominguez had been a frequent visitor until the friendly relationship was interrupted by a dispute over a telephone bill. During the investigation of the crime, Dominguez refused to allow officers to scrape his cuticles for a sample of "a reddish material . . . thought to be blood." The officers found blood stains on the hallway stairs leading to Dominguez's apartment, on the door to his apartment, and on a pillow case in his bathroom.

Dominguez testified that he had spent the day the crime was committed with his friend, Umberto Amilio. Amilio stated that he and Dominguez had been together all day except for a 20-minute interval between 1:30 and 2:00 p.m. when Dominguez left Amilio's apartment "to claim some money that was owed him, somebody by the name of Roger Smith".

This testimony contradicts none of the evidence against defendant. If it is taken as true and if the crime occurred before defendant arrived at the clerk's office, Dominguez was not the criminal agent. While the blood stains discovered in and around Dominguez's apartment and on his fingernail might support an

inference that he handled the bloody corpse, that inference is not inconsistent with his alibi. The verdict shows that the jury believed Dominguez's alibi.

Assessing the facts and circumstances we have summarized and considering the reasonable inferences they raise, we are of opinion that the Commonwealth successfully bore its burden of proving "beyond a reasonable doubt that motive, time, place, means and conduct concur in pointing out the accused as the perpetrator of the crime." Boykins v. Commonwealth, 210 Va. 309, 312, 170 S.E.2d 771, 773 (1969

B. Defendant's Absence at Trial

During the presentation of the Commonwealth's evidence, the trial judge permitted defendant to address the court. On several other occasions during the trial, defendant interrupted the proceedings with verbal protests. The trial court warned him that if he persisted he would be removed from the courtroom. In the final minutes of the Commonwealth's rebuttal summation, recorded on the last two pages of the transcript, defendant arose and began to speak. The trial court suspended the argument, advised defendant that he would be ejected if he made any further disturbance, and told him that this was his last warning. Defendant continued to protest, and the court admonished him to desist. Defendant resumed what the court described as a "harangue", and the court ordered him removed from the courtroom. At some point after the jury retired to consider its verdict, defendant returned and, at the direction of the court, the reporter and the interpreter read aloud the transcript of proceedings recorded in his absence.

Defendant argues that the trial court violated his "constitutional rights to be present at all stages of his trial." We take it he refers to his Sixth Amendment right of confrontation and his Fourteenth Amendment right to due process of law.

The Sixth Amendment right of confrontation is "a fundamental right", Pointer v. Texas, 380 U.S. 400, 403 (1965), and there is always a "'presumption against [a] waiver' of fundamental constitu-

tional rights", Johnson v. Zerbst, 304 U.S. 458, 464 (1938). But an accused may forfeit his right to be present at his trial "if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." Illinois v. Allen, 397 U.S. 337, 343 (1970). See also Diaz v. United States, 223 U.S. 442, 457-58 (1912) (citing Falk v. United States, 15 App.D.C. 446 (1899), cert. denied, 181 U.S. 618 (1901), affirming a conviction of a defendant who escaped from custody while his trial was in progress). And, as Justice Brennan observed in his concurring opinion in Allen, "[d]ue process does not require the presence of the defendant if his presence means that there will be no orderly process at all." 397 U.S. at 350.

It may be, as defendant says, that his conduct was not as egregious as that reviewed in Allen. Confined as we are to the written record, we cannot tell. But it is clear that his behavior was disorderly, disruptive, disrespectful, and persistently contumacious in the face of repeated warnings. Of the three sanctions approved in Allen, 397 U.S. at 343-44, the alternative the trial court employed was the one most favored by the Supreme Court, and we reject defendant's constitutional challenge.

Nor do we find any merit in defendant's contention that his expulsion violated his statutory right to be present "during the trial." Code § 19.2-259. While we have held that "the accused cannot waive it", Noell v. Commonwealth, 135 Va. 600, 609, 115 S.E. 679, 681 (1923), we have never held that an accused cannot forfeit the right accorded by this statute. For the reasons summarized in the constitutional analysis in Allen, we decline to do so now.

Expanding his argument under this assignment of error, defendant invokes the same statute in support of his complaint that he was absent during a conference called pursuant to Code § 19.2-16[illegible] Defense counsel requested an examination by a Spanish-speaking

psychiatrist. The trial court appointed an English-speaking psychiatrist to conduct the examination through an interpreter. Counsel objected, and the trial court offered to appoint the psychiatrist defendant requested as well. Defendant declined and elected to stand on his objection.

> "Generally stated, the rule is that [the accused] must be present on his arraignment, when any evidence is given or excluded, when the jury is charged, when the trial court wishes to communicate with the jury in answering questions by them, and when the jury receives further instructions. He must be present at every stage of the trial proper."

Palmer v. Commonwealth, 143 Va. 592, 605, 130 S.E. 398, 402 (1925).

We are of opinion that the conference, held in chambers on defendant's motion five days before the date set for trial, was not a "stage of the trial proper" within the intendment of Code § 19.2-259. See Williams v. Commonwealth, 188 Va. 583, 593, 50 S.E.2d 407, 412 (1948) (chamber conference conducted during trial on evidentiary question not "part of the actual trial").

C. Closing Argument

During closing argument, the Commonwealth's Attorney said:

> "On the suit we have blood consistent with the defendant's and consistent with the victim's. If it is the defendant's blood, where is the evidence that the defendant was ever bleeding between the time he left Fairfax County Jail to the time the suit was recovered[?]"

Defendant argues that these remarks constitute a comment on his failure to testify in violation of his rights under the Fifth Amendment and Code § 19.2-268.[5] We see nothing in the remarks to suggest that the missing evidence should have come from Quintana himself or that it could come from him alone. Many people saw defendant the day he was released from the Fairfax jail and the

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[5] Quintana makes the same argument concerning three other statements of the Commonwealth's Attorney. Unlike the complaint we address, defendant failed to make contemporaneous objection, and we will not notice these complaints on appeal. See note 1 supra. See also United States v. Nasta, 398 F.2d 283, 285 (2d Cir. 1968).

next day; none testified that he was bleeding. "[T]he test is whether, in the circumstances of the particular case, 'the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.' Knowles v. United States, 224 F.2d 168, 170 (10th Cir. 1955)." Hines v. Commonwealth, 217 Va. 905, 907, 234 S.E.2d 262, 263 (1977). See also United States v. Anderson, 481 F.2d 685, 701 (4th Cir. 1973), aff'd on other grounds, 417 U.S. 211 (1974).

That test is not satisfied in this case, and we find no error in allowing the argument.

Having considered all the issues properly before us, we find no error in the conduct of the guilt trial, and we will affirm the conviction of capital murder.

III. THE PENALTY PROCEEDINGS

A. Before the Jury

The jury reconvened the day after the verdict of guilty was rendered, and a separate proceeding was held on the issue of penalty, pursuant to Code § 19.2-264.3(C). As mandated by the statutory scheme, the proceeding was limited to a determination whether the defendant should be sentenced to death or life imprisonment. § 19.2-264.4(A). At such proceeding, the rules of evidence apply. The evidence presented may include the circumstances surrounding the offense, the history and background of the defendant, and facts in mitigation. § 19.2-264.4(B).

The statute further provides that the death penalty shall not be imposed unless the prosecution proves beyond a reasonable doubt certain factors of "dangerousness" or "vileness." The so-called "dangerousness" element is satisfied if the Commonwealth shows there is:

> "[A] probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which [defendant] is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, . . ." § 19.2-264.4(C).

Under the "vileness" provisions, the prosecution must prove that:

> "[Defendant's] conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." Id.

During the sentencing phase, a portion of the evidence presented by the Commonwealth included testimony of witnesses to whom defendant had made certain statements about his past criminal activity; the defendant called one witness who stated defendant formerly had been courteous, kind, and friendly to the witness and her daughter.

Called by the prosecutor, Pedro Castro testified that he was a friend of Quintana and that he met defendant in early 1981 when both were inmates in the Arlington County Jail. According to Castro, Quintana stated that "he killed a man" in Cuba by cutting his throat; that defendant was in jail at the time for "carrying off a girl" and raping her; that he had planned "to carry off a girl again" from a junior high school in Virginia, but was frustrated in this scheme because the police were called; that "he had a house" in Virginia in which to keep hostages "that he picked up"; and that when defendant was released from jail he planned to "grab" a specified individual.

The witness Suarez, see note 2 supra, testified that when he first met defendant, Quintana stated that he had committed a homicide in Cuba; that "he had found it necessary to kill somebody, because this gentleman had made his life impossible for him"; that "he had been jailed many times" as the result of "many, many problems with the [Cuban] police"; and that defendant had been "brought" to the United States directly from a Cuban jail. Suarez was of the opinion that Quintana was "bragging" about his past conduct in order to create a "macho" image.

Under the trial court's instruction that required the Commonwealth to prove "at least one of the following two alternatives," i.e., "dangerousness" or "vileness," the prosecutor argued to the

jury that both alternatives had been proved. After deliberating, the jury fixed defendant's punishment at death.[6]

Defendant contends Castro's testimony that recounted Quintana's statements was inadmissible hearsay. We disagree. Defendant's utterances to Castro were prior extra-judicial declarations freely made by a party to the criminal trial, and they were inconsistent with defendant's position at trial, i.e., that his prior history failed to show he had the propensity to commit future criminal acts. Consequently, the statements were properly received under the party admissions exception to the hearsay rule. Land v. Commonwealth, 211 Va. 223, 229, 176 S.E.2d 586, 590-91 (1970); Tyree v. Lariew, 208 Va. 382, 385, 158 S.E.2d 140, 143 (1967). See Skinner v. Commonwealth, 212 Va. 260, 262-63, 183 S.E.2d 725, 728 (1971); C. Friend, The Law of Evidence in Virginia, § 251 (1977).

[6]On appeal, Quintana argues the form of verdict was defective. The record shows defendant specifically approved the verdict form before it was submitted to the jury, specifically disclaimed any objection to the form after the verdict was rendered, failed to raise the issue in post-trial motions to set aside the verdict, and failed to raise the issue in any assignment of error on appeal. "[W]e will not notice a non-jurisdictional question raised for the first time in a . . . brief filed in this Court." Whitley v. Commonwealth, 223 Va. at 79 n.2, 286 S.E.2d at 170 n.2; Rule 5:21. See note 1, supra. See also Coppola v. Warden, 222 Va. 369, 282 S.E.2d 10 (1981).

The dissent misinterprets the basis of our decision not to consider defendant's belated contention about the verdict form, noting "[t]he majority refused to consider this argument on the grounds that defendant had not preserved the issue at trial and had not raised it by assignment of error on appeal." There was not only acquiescence but also affirmative ratification of the verdict form by the defendant, both before the form was tendered to the jury and after the verdict was returned.

Defendant also contends that his conduct as shown by the record does not support a finding of "vileness," and hence the jury improperly imposed the death penalty. We reject this contention.

The trial court ruled there was no evidence of torture and thus, in the pertinent instruction, limited the jury's consideration of the "vileness" factor to whether defendant's conduct "in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved depravity of mind or aggravated battery to the victim." Manifestly, the evidence supports each of these elements. The defendant, 28 years of age, attacked a 72-year-old woman in her apartment with a hammer, inflicting over a dozen lacerations, contusions, and bruises to her head, neck, and shoulders. The skull was fractured in 11 places; most of the head wounds could have been fatal. Such outrageous, inhumane, depraved conduct during the performance of an exaggerated beating of a helpless victim furnishes a sound basis for imposition of the extreme penalty.

B. Before the Trial Judge

Subsequent to the jury's verdict fixing punishment, and pursuant to Code § 19.2-264.5, the trial court ordered a probation officer to investigate and report upon the defendant to aid the court in determining whether the sentence was appropriate and just. Following receipt of the report, another hearing was held in August of 1981, after which the trial court confirmed the jury's verdict and imposed the death sentence.

Quintana argues the trial court erred in failing to reduce the sentence to life imprisonment. Noting the probation officer's efforts to obtain criminal records upon defendant from Cuba were unsuccessful, Quintana contends the report contained no information bearing upon his future "dangerousness" and thus the trial judge abused his discretion in confirming the jury verdict. That contention has no merit.

When the trial judge sentenced defendant, he had the benefit of all the evidence presented to the jury. In addition, the prosecutor proved during the August hearing that, while in jail awaiting sentencing, defendant made two knives from metal supports in his shoes. Also, during the same period, he had secreted in his cell a 35-foot rope made of jail uniforms tied together.

During his remarks from the bench at sentencing the trial judge said:

> "When it came to a determination of the penalty in this case, the jury was assisted with a bifurcated trial which enabled them to hear some background information in addition to what they heard during the trial. The defendant may actually be better off in that no record of his from Cuba was available, and basically what they heard about his background was what emerged from his own lips. There was sufficient evidence before the jury to justify their conclusions that there was a probability that if he were to continue to live in the community that he would commit criminal acts of violence, constituting a serious threat to society. There can be no question that the circumstances attending the death of the deceased were outrageously and inhumanly conducted involving depravity of mind and aggravated battery to the victim. The people of Virginia, through their elected representatives, have decided that certain types of criminal conduct are so severe and outrageous that they must be deterred by the ultimate penalty. This is one of those cases."

Our review of this record convinces us the evidence fully supports the trial court's conclusions and that there was no abuse of discretion in confirming the sentence to death.

IV. Sentence Review

Code § 17-110.1 requires this Court, in addition to any trial errors enumerated by appeal, to consider and determine (1) whether the death sentence "was imposed under the influence of passion, prejudice or any other arbitrary factor" and (2) whether the sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Quintana argues the sentence was imposed under the influence of arbitrary factors. He says the only evidence of future dangerousness came from Castro, a convicted felon. He notes there was no torture or sexual abuse of the victim. He repeats his contention that a hammer is not ordinarily a lethal weapon and its use here should not be considered an indication of a depraved mind. He contends the verdict was "clouded by passion and prejudice" because the jury "ignored" the testimony of his only witness in mitigation.

In addition, defendant argues the sentence was excessive and disproportionate. Recounting alleged deficiencies in the probation report and comparing with this case the atrocious facts of other capital murder cases we have decided, Quintana asserts the death penalty here is unjustified.

We disagree with the foregoing contentions. The jury and, in turn, the trial judge had abundant evidence upon which to base their findings of both "dangerousness" and "vileness." We have already addressed in part IIIA, supra, the sufficiency of the proof upon the latter requirement.

As to the factor that defendant will pose a continuing serious threat to society, we need only refer again to the heinous circumstances surrounding this homicide, committed upon a 72-year-old woman during the course of robbery. The jury and trial court could properly conclude that if defendant has killed once under these circumstances for the mere purpose of obtaining a sum of money, he is likely to kill again, whether incarcerated or not, for an equally devious purpose. Furthermore, the jury and the trial judge obviously accepted Castro's testimony, as they had a perfect right to do, which showed Quintana's proclivity for plotting to take hostages and for committing other acts of violence. Indeed, among the items found in defendant's automobile after the murder

were chains, padlocks, rope, cloth belts, and pieces of cord, all items susceptible of being used to detain abductees and hostages. Consequently, we hold that no arbitrary factors influenced the sentence in this case.

Upon the questions of excessiveness and disproportionality, we have examined the records in all capital murder cases reviewed by this Court to determine "whether generally in this jurisdiction triers of fact 'impose the death sentence for conduct similar to that of the defendant.'" Giarratano v. Commonwealth, 220 Va. 1064, 1079, 266 S.E.2d 94, 103 (1980), quoting Stamper v. Commonwealth, 220 Va. 260, 284, 257 S.E.2d 808, 824 (1979), cert. denied 445 U.S. 972 (1980). Our examination discloses that this sentence is not excessive or disproportionate to the penalty imposed in similar cases, considering both this crime and this defendant. For example, in Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979), cert. denied 444 U.S. 1103 (1980), Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), cert. denied 451 U.S. 1011 (1981), and Clanton v. Commonwealth, note 1 supra, we have sustained the imposition of death sentences where the capital murders were committed during the course of armed robbery. In Coppola, there was a finding of only "vileness," the female victim being severely and repeatedly beaten about the head and strangled. In Turner and Clanton, there were findings of "vileness" and "dangerousness." The Turner victim was shot three times during the robbery of his jewelry store; the female victim in Clanton was stabbed and strangled by a cord in her apartment. The brutality visited upon Quintana's victim is comparable to that inflicted in our prior similar death penalty cases.[7]

[7]We expressly reject the dissent's contention that our procedural ruling, note 6 supra, when applied to the "disproportionality inquiry," violates the statutory command of Code § 17-110.1.

Record
No. 811845

For all the foregoing reasons, we hold the trial court committed no error. Furthermore, we have independently decided from a review of the entire record that the sentence of death was properly assessed. Consequently, the judgment below will be

Affirmed.

Poff, J., concurring in part and dissenting in part.
Stephenson, J., joins in concurring and dissenting opinion.

MANUEL C. QUINTANA

-v- Record No. 811845

COMMONWEALTH OF VIRGINIA

Poff, J., concurring in part and dissenting in part.

I would uphold the conviction of capital murder but commute the sentence of death to imprisonment for life.

On appeal, defendant argued that the jury's penalty verdict was ambiguous "and therefore violated his constitutional right to a unanimous verdict." The majority refused to consider this argument on the grounds that defendant had not preserved the issue at trial and had not raised it by assignment of error on appeal. The majority misconceives the nature and scope of appellate review of the death penalty.

Code § 17-110.1 commands this Court to "consider and determine . . . [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." We must consider the disproportionality question "[i]n addition to consideration of any errors in the trial enumerated by appeal." Id. The statutory command is absolute, the death-penalty review is automatic, and the disproportionality inquiry is not conditioned upon defense counsel's compliance with rules governing appellate procedure in noncapital cases. We have only recently held that the waiver rule (i.e., that an error assigned is waived if not argued on appeal) does not apply to the penalty review mandated by Code § 17-110.1(C). Fitzgerald v. Commonwealth, 223 Va. , , S.E.2d , (1982). While I agree that the waiver rule, the contemporaneous objection rule, and Rule 5:21 apply to defendant's appeal of his capital murder conviction, I believe their application to a determination of disproportionality vel non violates the statutory command.

In making such a determination, we must conduct an independent survey of similar capital cases, compare the penalties imposed, and decide whether Virginia juries generally impose the death penalty in such cases. Stamper v. Commonwealth, 220 Va. 260, 283-84, 257 S.E.2d 808, 824 (1979). In order to conduct such a survey, we must be able to identify cases that are similar to the one at bar. Our task is impossible in this appeal.

Code § 19.2-264.2 provides that "a sentence of death shall not be imposed" except upon certain findings of "aggravating circumstances" which have come to be called "the vileness predicate" and "the dangerousness predicate." It is axiomatic that a jury's verdict in a criminal case must be unanimous. Va. Const., art. I, § 8; Rule 3A:24(a). When the legislature conditions a penalty upon such factual predicates, a jury's verdict is not unanimous unless its findings are unanimous.

Here, we know that the death-penalty decision was unanimous, but we do not know upon what finding or findings it was based. This is because, as defendant says, the verdict form is fatally ambiguous. The form, submitted by the trial court and returned without change by the jury, read as follows:

> We, the jury, on the issue joined, having found the defendant guilty of the willful, deliberate and premeditated killing of Ofelia Quintero in the commission of robbery while armed with a deadly weapon and that after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind or aggravated battery to the victim, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death [emphasis added].

The trial court did not instruct the jurors to delete any finding or part or parts of any finding upon which they failed to reach unanimous agreement. Yet, the majority conducts its disproportionality analysis upon the theory that all the jurors agreed that the Commonwealth had established both the dangerousness

predicate and the vileness predicate. But this is no more than a theory. The jury's verdict stated the two death penalty predicates in the alternative. No one can tell whether the jury found both predicates or only one, and if only one, which one. Indeed, it is possible that some jurors found only the dangerousness predicate and other jurors only the vileness predicate, while other jurors found both. Even if a plurality or a majority of the jurors agreed upon one or both of the death-penalty predicates, the verdict is not constitutionally sufficient.*

The possibility of diversity in the verdict is heightened by the fact that the jurors were told in a separate instruction that they could impose the death penalty if the Commonwealth proved "at least one" of the statutory predicates. An individual juror could have interpreted that instruction to mean that he was free to vote for the death penalty if he found only one of the predicates, even if all the other jurors disagreed with his finding.

For purposes of the disproportionality analysis, "similar cases" are those in which the penalties were based upon the same predicate (or predicates) as that underlying the penalty under review. Evans v. Commonwealth, 222 Va. 766, 778, 284 S.E.2d 816, 822-23 (1981) (dangerousness only). See also Fitzgerald v. Commonwealth, supra (vileness only); Clanton v. Commonwealth, 223 Va. 41, 286 S.E.2d 172 (1982) (dangerousness and vileness).

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* I am aware that we have rejected challenges to the verdict form in two recent appeals. But there was no room for ambiguity in either case. In Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), the appendix showed that the verdict form submitted by the trial court instructed the jurors to "[c]ross out any paragraph, word or phrase which you do not find beyond a reasonable doubt." See Virginia Model Jury Instructions I-437 which contains the same language. And in James Dyral Briley v. Commonwealth, 221 Va. 563, 577, 273 S.E.2d 57, 66 (1980), "[e]ach member of the jury was polled individually and each responded affirmatively that both aggravating circumstances were present."

Because we cannot determine upon what finding or findings defendant's death penalty was predicated, we cannot identify "similar cases" for purposes of comparison. Hence, we are unable to determine whether his penalty is excessive or disproportionate. Under such circumstances, we have no authority to remand the case for a new penalty trial; our only option is to "[c]ommute the sentence of death to imprisonment for life." Code § 17-110.1(D)(2). See Wm. Patterson v. Commonwealth, 222 Va. 653, 660, 280 S.E.2d 212, 216 (1981).

I am in accord with the view that the evidence is sufficient to support a finding of either death-penalty predicate, but I cannot agree that the record shows that the jury reached unanimous agreement on either, much less on both. In my view, commutation is a constitutional and statutory imperative.

Stephenson, J., joins in this concurring and dissenting opinion.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 15th *day of* October, 1982.

Manuel Quintana, Appellant,

against Record No. 811845
Circuit Court No. C-17450

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 9th day of September, 1982, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Allen L. Lucas
Clerk

Supreme Court of the United States

No. A-493

MICHAEL C. QUINTANA,

Petitioner,

v.

VIRGINIA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(x),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 13, 19 83

/s/ Warren E. Burger
Chief Justice of the United States.

Dated this 1st
day of December, 19 82

Appendix D

§ 17-110.1. Review of death sentence. — A. A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court.

B. The proceeding in the circuit court shall be transcribed as expeditiously as practicable, and the transcript filed forthwith upon transcription with the clerk of the circuit court, who shall within ten days after receipt of the transcript, compile the record as provided in Rule 5:14 and transmit it to the Supreme Court.

C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and

2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. In addition to the review and correction of errors in the trial of the case, with respect to review of the sentence of death, the court may:

1. Affirm the sentence of death; or

2. Commute the sentence of death to imprisonment for life.

E. The Supreme Court may accumulate the records of all capital felony cases tried within such period of time as the court may determine. The court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive. Such records as are accumulated shall be made available to the circuit courts.

F. Sentence review shall be in addition to appeals, if taken, and review and appeal may be consolidated. The defendant and the Commonwealth shall have the right to submit briefs within time limits imposed by the court, either by rule or order, and to present oral argument. (1977, c. 492.)

§ 18.2-31. Capital murder defined; punishment. — The following offenses shall constitute capital murder, punishable as a Class 1 felony:

(a) The willful, deliberate and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money, or a pecuniary benefit;

(b) The willful, deliberate and premeditated killing of any person by another for hire;

(c) The willful, deliberate and premeditated killing of any person by an inmate in a penal institution as defined in § 53-19.18, or while in the custody of an employee thereof;

(d) The willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon;

(e) The willful, deliberate and premeditated killing of a person during the commission of, or subsequent to, rape; and

(f) The willful, deliberate and premeditated killing of a law-enforcement officer as defined in § 9-108.1 (h) when such killing is for the purpose of interfering with the performance of his official duties. (Code 1950, §§ 18.1-21, 53-291; 1960, c. 358; 1962, c. 42; 1966, c. 300; 1970, c. 648; 1973, c. 403; 1975, cc. 14, 15; 1976, c. 503; 1977, c. 478; 1979, c. 582.)

Article 4.1.

Trial of Capital Cases.

§ 19.2-264.2. Conditions for imposition of death sentence. — In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed. (1977, c. 492.)

§ 19.2-264.3. Procedure for trial by jury. — A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence of the defendant of the offense charged in the indictment, or any other offense supported by the evidence for which a lesser punishment is provided by law and the penalties therefor.

B. If the jury finds the defendant guilty of an offense for which the death penalty may not be imposed, it shall fix the punishment for such offense as provided by law.

C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty, which shall be fixed as is provided in § 19.2-264.4. (1977, c. 492.)

§ 19.2-264.4. Sentence proceeding. — A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any Rule of Court, shall not be admitted into evidence. Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance or (iii) the victim was a participant in the defendant's conduct or consented to the act, or (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (v) the age of the defendant at the time of the commission of the capital offense.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his [conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his past criminal record that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim)], and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed . . . . . foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed . . . . . foreman"

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life. (1977, c. 492.)

§ 19.2-264.5. Post sentence reports. — When the punishment of any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate upon the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just. Reports shall be made, presented and filed as provided in § 19.2-299. After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life. (1977, c. 492.)

C-17450

We, the jury, on the issue joined, having found the defendant guilty of the willful, deliberate and premeditated killing of Ofelia Quintero in the commission of robbery while armed with a deadly weapon and that after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society [or] his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind or aggravated battery to the victim, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

10 June 81
DATE

George H. Gowens
FOREMAN

Note: Bracketing added, for emphasis only

NO. 82-6035

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

MANUEL C. QUINTANA,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED

I. Whether The Interpretation By The Virginia Supreme Court Of The Virginia Capital Murder Statute Raises A Federal Constitutional Question.

II. Whether The "Dangerousness Predicate" May Be Based On Evidence Other Than Convictions For A Crime.

III. Whether The State Court's Application Of A Procedural Bar To Review Of A Jury's Verdict Form Violates The Petitioner's Due Process Rights.

IV. Whether The State's Application Of A Procedural Bar To Witherspoon Objections Violates The Petitioner's Right To A Fair And Impartial Trial.

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JURISDICTION

The Petitioner asserts that the jurisdiction of this Court is grounded upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provisions involved in the instant case are set out in the petition for a writ of certiorari previously filed with this Court.

STATEMENT OF THE CASE

The Petitioner was convicted in the Circuit Court of Arlington County on August 4, 1981, in Commonwealth v. Manuel Quintana, Criminal No. C-17450. A copy of that conviction order is appended to the petition for certiorari at App. A.

The judgment of the Supreme Court of Virginia affirming the Petitioner's conviction was entered on September 9, 1982 in Quintana v. Commonwealth, Record No. 811845, which is found at App. B. of the petition for certiorari. This opinion is also reported at 295 S.E.2d 643. Subsequent to the Virginia Supreme Court's affirmance of the Petitioner's conviction, the Petitioner filed a petition for rehearing which was denied without opinion by an order dated October 15, 1982.

STATEMENT OF FACTS

On March 19, 1981, the deceased, Ofelia Quintero, age 72, was found dead in her apartment. There had been no forced entry, or signs of a struggle. The victim lay in a pool of blood in the kitchen; there were spatters of blood on the radiator near the body. The deceased had received four blows to the right side of the head; the skull was fractured and exposed. There were three blows to the left side of the head, six tearing lacerations on the scalp on the back of the head, and a large area of contusion on the back of the neck. Crescent-shaped bruises were on the back of the chest and shoulder blades and scrapes were found on the back of the left hand. The skull was badly damaged and pushed into the brain. There were a total of thirteen discreet wounds to the head (one consistent with a fall to the floor), five discreet wounds to the lower back from the neck down. The number of wounds on the back of the neck could not be determined. The cause of death was multiple blunt-force entry trauma, with skull fractures and a cerebral brain injury or trauma. All but two of the wounds to the head would have been fatal. The time of death could have been as early as 8:00 a.m. or as late as 2:30 p.m. The murder weapon was consistent with a hammer. Blood and hair found on a hammer at the scene was consistent with that of the victim.

The victim's son, Nelson Echemendia, lived in the apartment with his mother. He left for work at 6:30 a.m., and his mother was alive, and the apartment was neat and orderly. On his return, many items were missing and the apartment was in disarray, clothes were scattered. A wallet containing approximately $1,000 was taken (mostly in twenty-dollar bills). A form belong to Echemendia was kept in the wallet. Nelson Echemendia testified that he knew the Petitioner. Petitioner had visited his apartment in the past on February 3. The Petitioner had not previously handled the camera in the apartment, and the water jug on the table was usually kept in the refrigerator.

The decedent usually served coffee to visitors in small cups. On the day of the murder, coffee was on the stove and cups were on the counter. A dining room chair was moved into the kitchen. The Petitioner knew where the hammer (murder weapon) was kept and that Echemendia and the deceased were saving for a trip. Other people knew Echemendia had money.

The Petitioner's fingerprints were found on the camera and the water jug. These fingerprints were recent.

The Petitioner was released from jail in Fairfax on March 18, 1981, at 5:00 p.m. He only had fifteen cents. The Petitioner was wearing a three-piece suit he had stolen from Humberto Rodriguez. The Petitioner wore the suit on the day of the murder. The suit had blood on a sleeve and on the pants below the knee consistent with the blood of the deceased.

On March 19, the Petitioner bought a car for $350.00 in cash, paid for in twenty-dollar bills. The Petitioner was wearing a hat similar to the one stolen at the crime scene on the day he bought this automobile. The Petitioner made other purchases on the day of the murder and the day thereafter. The Petitioner's wallet contained over $160.00.

The Petitioner went to the Clerk's Office in Fairfax on March 19, 1981, at approximately 1:30 p.m., the day of the murder. The Petitioner stated to the Deputy Clerk, Carman Salgado, that he saw a friend injured (older lady) at the bottom of some stairs. She had some gashes in her head. The Petitioner had blood on his shirt.

The Petitioner was thereafter arrested and his automobile seized. The automobile contained items taken from the deceased's apartment which were identified by Echemendia at trial. The form which Echemendia kept in the wallet was found in the Petitioner's automobile.

In addition to the foregoing Statement of Facts, the Respondent relies on the Statement of Facts found in the Slip Opinion of the Virginia Supreme Court which is annexed to the Petition for a Writ of Certiorari. See Slip Opinion 4-11.

REASONS FOR DENYING THE WRIT

I. The interpretation of Virginia Code § 18.2-31(d) is a matter of state law and no federal constitutional question is presented.

The Petitioner has argued that Virginia Code § 18.2-31(d) is not applicable to his conduct in this case because he did not pre-arm himself prior to going into the victim's apartment and murdering said victim. He argues that the language is vague and thus the death penalty should not be imposed under these circumstances. The Commonwealth argues that the statutory interpretation by the Virginia Supreme Court is dispositive. The definition of a deadly weapon had long been defined prior to the enactment of § 18.2-31(d). See Slip Opinion at p. 8, annexed to the Petition for Certiorari. The Virginia Supreme Court cited two prior cases defining a deadly weapon. Floyd v. Commonwealth, 191 Va. 674, 62 S.E.2d 6 (1950); and Pannell v. Commonwealth, 185 Va. 244, 38 S.E.2d 457 (1946). These definitions were adhered to in cases decided after enactment of § 18.2-31(d). Pritchard v. Commonwealth, 219 Va. 27, 252 S.E.2d 352 (1979); and Cox v. Commonwealth, 218 Va. 689, 240 S.E.2d 524 (1978).

In construing the statute as to when one must be armed, certainly it is not an unreasonable interpretation that this means at any time prior to the criminal act. Indeed, the Supreme Court's statement that "a person is criminally armed from the moment he *seizes a weapon with intent to use it for a criminal purpose*" (Slip Opinion at page 8) is a reasonable construction of the statute and therefore not unconstitutional as applied to the Petitioner. This Court has long held that the Supreme Court of the United States is bound by the state interpretations of its own statute:

> We are bound by a state's interpretation of its own statute and will not substitute our judgment for that of the state's when it becomes necessary to analyze the evidence for the purpose of determining whether evidence supports the findings of the state court.

Garner v. Louisiana, 368 U.S. 157, 166 (1961).

In Gryger v. Burk, 334 U.S. 728, 731 (1948), this Court said:

> We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.

See also Whalen v. United States, 445 U.S. 684 (1980); Gooding v. Wilson, 405 U.S. 518 (1972).

In Mullaney v. Wilbur, 421 U.S. 684, 685 n. 11 (1975), the court found that a federal court may not review a state court's interpretation of its own statute unless it is an obvious subterfuge to evade consideration of a federal issue. There has been no allegation that the Virginia Supreme Court has attempted to evade any constitutional issue.

In the case at bar the facts show that the Petitioner went to the deceased's apartment and while there armed himself with a hammer and murdered the deceased during the commission of a robbery. Whether the Petitioner formed the intent to commit murder prior to entering the apartment is not a constitutional question. It is clear that the Petitioner armed himself with a deadly weapon prior to his committing the murder and the robbery. Whether the murder occurred prior to the robbery or immediately thereafter is of no significance. Both acts were committed contemporaneously, and, therefore, Petitioner's argument is without merit.

It should be noted that this claim was raised in the state court only in the context of being violative of state law and the state Constitution. Petitioner never asserted below a violation of the Federal Constitution in this regard. This is a jurisdictional prerequisite. Cardinale v. Louisiana, 394 U.S. 437 (1969).

II. ADMISSIBILITY OF EVIDENCE AT THE PENALTY PHASE IS A MATTER OF STATE LAW.

After the Petitioner was found guilty, evidence was presented at the sentencing stage to show that the Petitioner was a continuing threat to society. Padro Castro, an inmate with the Petitioner, testified that the Petitioner admitted to a prior killing by cutting a man's throat in a Cuban jail. The Petitioner also admitted to Castro that he had committed rape in Cuba. The Petitioner told Castro that he was going to carry off again a girl from school by telling them that their mother was sick. Castro testified that the Petitioner showed no remorse for killing in Cuba. The Petitioner also stated to Castro that he would grab the man with four children when he was released.

The Petitioner's statements to Castro were corroborated by Caunabot Saurez Del Sol about the killing in Cuba. The Petitioner's police record was unavailable.

At the sentencing stage before the judge, it was learned that the Petitioner had made some knives in jail, and had tied some jail uniforms together. Section 19.2-264.4(b), in pertinent part, provides:

> Evidence which may be admissible, subject to the rules of evidence regarding admissibility may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense.

The sentence stage in the capital murder case is provided so that the jury can consider all pertinent evidence relating to Petitioner's background and history on aggravation and continuing threat to society prior to imposing the death penalty. The evidence complained of by the Petitioner, it is submitted, sheds light on the Petitioner's prior history. In Jurek v. Texas, 428 U.S. 262 (1976), the Court stated:

> What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.

428 U.S. at 276.

The Commonwealth argues that the evidence to be admitted at the sentencing stage should be left to the trial court's sound judicial

discretion. This Court recognized this fact in United States v. Grayson, 438 U.S. 41 (1978):

> [A] sentencing judge is not limited to the often far ranging material compiled in a pre-sentence report. Before making the sentencing determination, a judge may appropriately conduct an inquiry broad in scope, largely limited either as to the kind of information he may consider, or the source from which it may come. 438 U.S. 50. ... There the court permitted the sentencing judge to consider the offender's history of prior antisocial conduct, including burglaries for which he had not been duly convicted. This it did despite the risk that the judge might use his knowledge of the defendant's prior crimes for an improper purpose.

438 U.S. at 64. See also Williams v. New York, 337 U.S. 241, 244-246 (1949). The Commonwealth argues that the due process issue at sentencing is whether a defendant disputes the information he must be given a chance to rebut it or comment on it. United States v. Barnett, 587 F.2d 252, 259 (5th Cir. 1979); United States v. Yates, 554 F.2d 342 (7th Cir. 1977). In the case at bar, the Petitioner was given full opportunity to rebut any evidence presented by the Commonwealth.

The Petitioner's argument that the evidence was hearsay and no formal conviction order was presented is not determinative. The evidence was admissible as evidence against penal interests as decided by the Virginia Supreme Court. See Slip Opinion at page 17. The Commonwealth argues, therefore, that this evidence was fully admissible and was reliable and properly admitted under state law. This Court has held that the admissibility of evidence is a matter of state law and therefore not a federal question. See Moore v. Illinois, 408 U.S. 706 (1972).

The practice of admitting said evidence is consistent with that practice in other jurisdictions. See United States v. Morgan, 595 F.2d 1134 (9th Cir. 1979)(evidence of prior crime admitted even though defendant had been acquitted); United States v. Benton, 637 F.2d 1052, 1060 (5th Cir. 1981)(co-defendant's

statement implicating himself and defendant in another crime); United States v. Hodges, 556 F.2d 366 (5th Cir. 1977)(defendant's statement to another concerning prior robbery); Milton v. State, 599 S.W.2d 824 (Tex. Ct. Crim. App. 1980)(unadjudicated prior robberies); People v. Siefke, 421 N.E.2d 1081, 1083 (Ill. App. 1981)(victim of another prior unadjudicated crime); Jackson v. State, 426 N.E.2d 685, 689 (Ind. 1981)(evidence of a prior crime without conviction); United States v. Jackson, 649 F.2d 967 (3d Cir. 1981)(prior criminal complaint); Wilder v. State, 583 S.W.2d 349 (Tex. Ct. Crim. App. 1979)(prior crime which shed light on deliberateness and future criminal conduct); and People v. Hillery, 423 P.2d 208 (Cal. 1967)(evidence of a prior crime upon which the defendant had not been convicted).

Because the sentencing proceeding in a capital case is wide-ranging in scope and the issue is whether or not the Petitioner poses a future threat to society, evidence of prior crimes is admissible whether any conviction therefor have been obtained.

Again it should be noted that this claim was raised in the state court only in the context of being violative of state law and procedure. Petitioner never raised this issue below as being in violation of the Federal Constitution. This is a jurisdictional prerequisite. Cardinale v. Louisiana, supra.

III. THE VIRGINIA SUPREME COURT'S APPLICATION OF A PROCEDURAL BAR TO THE VERDICT FORM PRECLUDES REVIEW IN THIS COURT.

The Commonwealth argues that the issue before the Court in this instance was not properly raised in the trial court, nor was it properly raised in the court below. Consequently, the Virginia Supreme Court applied a procedural rule, Rule 5:21 of the Rules of the Virginia Supreme Court and declined to review this assignment of error.

It is a jurisdictional requirement that the federal question which this Court is asked to consider be properly raised in the

state court proceeding. Godchaux Company v. Estopinal, 251 U.S. 179, 181 (1919); and Beck v. Washington, 369 U.S. 541, 550 (1962). See also Amalgamated Food Employees' Union v. Loganvalley Plaza, 391 U.S. 308, 334 (dissent) (1968). See also Cardinale v. Louisiana, supra.

A state procedural rule which forbids the raising of federal questions at late stages in a case is a valid exercise of state power. Williams v. Georgia, 349 U.S. 375, 382-383 (1955); and Wainwright v. Sykes, 433 U.S. 72 (1977). In Henry v. Mississippi, 397 U.S. 443, 446 (1965), this Court held:

> It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds even where those judgments also decide federal questions.

Not only did the Petitioner fail to object in the trial court as to the verdict form, he also affirmatively ratified the form prior to the jury's verdict and after the verdict was rendered by the jury. See Slip Opinion of the Virginia Supreme Court, page 17.

The Commonwealth notes that the instructions given to the jury could easily be interpreted that if the jury did not find beyond a reasonable doubt both alternatives, then they must give the Petitioner life imprisonment. The transcript of trial, at page 1461-1462, reveals the instructions to the jury. On page 1462 of the transcript, at line 14-17, the Court instructed the jury as follows:

> If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment.

Certainly this could be interpreted that the trial court was instructing the jury that both alternatives must be found beyond a reasonable doubt prior to the return of a sentence of death.

Assuming but not conceding the jury form is in any way defective, the Commonwealth argues that the verdict returned by the jury was proper. This Court found in Stromberg v. California, 283 U.S. 359, 367-368 (1931), that where a general verdict is based on three alternatives, the failure of one alternative vitiates

the jury verdict. In the case at bar, Petitioner argues that because it is unclear which aggravating circumstance the jury found, that the death penalty should be set aside. However, the Commonwealth argues that the Petitioner must show which predicate is invalid. The evidence adduced in the Petitioner's case at the penalty stage proved beyond a reasonable doubt that both aggravating factors were present. Therefore the death penalty should stand unless the Petitioner can show that one of the factors is defective. This same result obtained in Cunningham v. State, 248 Ga. 558, 284 S.E.2d 390 (1981), cert. denied, ____ U.S. ____ (Record No. 81-6151 March 2, 1982):

> The appellant argues that since the jury found the aggravating circumstance set forth in division nine above in the words of the statute, that is, a finding connected by the conjunction 'or,' this in itself indicates that the jury did not make up their minds that the aggravating circumstances existed beyond a reasonable doubt. However, the jury's returning the aggravating circumstance is sufficient when evidence supports such a finding.

284 S.E.2d at 396.

In the case at bar, there is no question that the jury verdicts were supported by the evidence. Therefore, there is no merit to the Petitioner's complaint.

IV. WHETHER THE PROSPECTIVE JURORS WERE IMPROPERLY AND UNCONSTITUTIONALLY SELECTED IN VIOLATION OF WITHERSPOON IS NOT PROPERLY BEFORE THIS COURT.

The Petitioner has alleged that jurors were excluded from the jury panel which decided his case improperly, in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). The Virginia Supreme Court applied a procedural bar to noticing this error in the Virginia Supreme Court because the Petitioner had failed to object at trial which violated Rule 5:21 of the Rules of the Virginia Supreme Court. The Commonwealth argues that the Petitioner's failure to properly preserve his constitutional claim for review defeats jurisdiction in this Court. See Godchaux

Company v. Estopinel, supra; Beck v. Washington, supra; and Amalgamated Food Employees Union v. Logan Valley Plaza, supra. Indeed, the Virginia Supreme Court's denial of this claim based on an independent state ground has been held by this Court to defeat jurisdiction in a petition for certiorari. See Henry v. Mississippi, supra.

To allow the Petitioner to have the merits of this claim reviewed by the Virginia Supreme Court or this Court would be contrary to the teachings of Wainwright v. Sykes, 433 U.S. 72 (1977). In Sykes, this Court required that constitutional claims must be preserved in accordance with the state procedural law or they are not cognizable in a petition for a writ of habeas corpus. This rule is to prevent "sandbagging" by defense counsel who wait until it is too late for the trial court to correct any error and then interpose objection. There is adequate bases for the procedural rule, and this Court should decline jurisdiction. The cases cited by the Petitioner on brief where the Witherspoon issue was raised for the first time in a petition for certiorari are not dispositive. Most of the trials in those cases occurred prior to the decision in Witherspoon, and all of those cases were decided prior to this Court's holding in Wainwright v. Sykes.

Failure to object to jurors under Witherspoon is a bar to review. See Bass v. State, 622 S.W.2d 101, 108 (Texas Ct. Crim. App.), cert. denied, ____ U.S. ____, 72 L.Ed.2d 491 (1981); see also People v. Haskett, 30 Cal.3d 841, 180 Cal.Rptr. 640, 640 P.2d 776, 778 (1982); White v. State, 629 S.W.2d 701, 705 (Texas Ct. Crim. App.), cert. denied, ____ U.S. ____, 72 L.Ed.2d 457 (1982); see also Hicks v. State, 414 So.2d 1137, 1139 (Fla. App. 1982).

Aside from the jurisdictional arguments, the Commonwealth argues that the jurors who were excluded in this case were properly excluded under the Witherspoon test. The transcript of trial of June 1, 1981 shows that the jurors Michael, Lee, Steigleman,

McKenna and Hickey were properly excluded under the Witherspoon test. The jurors were asked, "In other words, is your objection to the imposition of the death sentence so absolute that you would never under any circumstances agree to impose the sentence of death?" (Tr. p. 44). Each juror answered in the affirmative without equivocation. Jurors Loucas, Gray, Matticole, Gauaze, Welch, Bishop, Kelley and Lesse were likewise unequivocal in their response to the following question: "Because of your views, would you never impose a sentence of death in any case?" (Tr. of June 1, 1981, at 86-87).

Witherspoon does not outlaw the exclusion of jurors who are unalterably opposed to the death penalty. In Witherspoon at 522 n. 21, this Court stated:

> [N]othing we say today bears upon the power of a state to execute a defendant's sentence to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakeably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them.... (Emphasis original).

Those jurors who were excused in the case at bar in response to the questions presented to them make it clear that they would never impose capital punishment under any circumstances. Certainly this meets the requirement under Witherspoon.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas D. Bagwell, Assistant Attorney General of Virginia, Counsel of Record for the Respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 11th day of February, 1983, three copies of the foregoing Brief for the Respondent in opposition to the grant of a Writ of Certiorari were mailed, first-class postage pre-paid, to Jose R. Recinto, Jr., 2045 North 15th Street, Arlington, Virginia 22201, Counsel of Record for Petitioner.

Thomas D. Bagwell
Assistant Attorney General

objection to the death penalty absolute? That is, because your views or objections to the death penalty, would you refuse to consider its imposition under any circumstances whatsoever?

MR. MELSON: If I may ask each one to respond individually.

Karen Michael?

JUROR MICHAEL: I'm not sure I understand what you are saying.

MR. MELSON: In other words, is your objection to the imposition of the death sentence so absolute that you would never under any circumstances agree to impose a sentence of death?

JUROR MICHAEL: Right.

MR. MELSON: Mrs. Lee?

JUROR LEE: Yes,

MR. MELSON: Mrs. Steigelman?

JUROR STEIGELMAN: Yes.

MR. MELSON: Mr. McKenna?

JUROR MC KENNA: Yes.

MR. MELSON: Mr. Hickey?

JUROR HICKEY: Yes.

MR. MELSON: Now, for those members of the jury who

Yes, m'am?

JUROR GOUAZE: There are two options?

MR. MELSON: Yes, m'am. If the defendant is found guilty, you either have life or the death penalty. Now, would that option make you hesitant to find him guilty of capital murder because you have that option?

Would your views on capital punishment cause any of you to automatically impose life imprisonment as a sentence for murder rather than the death penalty?

Yes, is that Grace Gouaze? Is there anybody else? All right, Ms. Lesse and Mr. Loucas. All right. These are the individuals who responded previously to note their objection to the death penalty.

For those of you who responded affirmatively to the questions concerning objections to the death penalty as well as the juror that just responded to the last question, let me ask you this. Is your objection to the death penalty absolute? In other words, because of your views or objections to the death penalty, would you refuse to consider its imposition in any case regardless of the circumstances?

Let me ask each of you individually. Mr. Loucas?

JUROR LOUCAS: I didn't get the question clear.

MR. MELSON: Because of your views --

JUROR LOUCAS: (Interposing) Yes?

MR. MELSON: (Continuing) -- would you never impose the death sentence in any case?

JUROR LOUCAS: Yes, uh huh.

MR. MELSON: You would not impose it regardless of the circumstances?

JUROR LOUCAS: Yes, I would.

MR. MELSON: Are you saying you would not?

JUROR LOUCAS: Yeah.

MR. MELSON: And Mary Gray?

JUROR GRAY: I would.

MR. MELSON: Perhaps --

JUROR GRAY: (Interposing) Explain it to me a little better to me.

MR. MELSON: I'm asking you whether your objection to the death penalty is absolute?

JUROR GRAY: Yes.

MR. MELSON: In no case would you ever impose the death penalty?

JUROR GRAY: I'm afraid I wouldn't.

MR. MELSON: That's quite all right. I want you to be very candid with us on that subject.

Mrs. Matticole?

JUROR MATTICOLE: I would -- I would not.

MR. MELSON: Would not in any case impose the death penalty?

JUROR MATTICOLE: Yes, I would oppose it. I would not like to judge him and give him the death penalty.

MR. MELSON: I guess I'm having a hard time hearing. Are you saying in any case regardless of the circumstances you would not impose the death sentence?

JUROR MATTICOLE: That's right.

MR. KENDRICK: Your Honor, I didn't get that answer. I'm sorry to interrupt Mr. Melson's examination. I felt like the first time she said her opposition was not absolute.

THE COURT: I gather, Ms. Matticole --

JUROR MATTICOLE: (Interposing) I didn't phrase it properly, but --

THE COURT: (Interposing) You would not impose the death penalty in any case no matter what the evidence would show?

JUROR MATTICOLE: No, I would not.

MR. MELSON: Miss Gouaze, would you have the same or a different answer?

JUROR GOUAZE: I would vote for life imprisonment. I believe that we should have the death penalty in law, but

I'm reluctant to subject somebody to that.

MR. MELSON: So, you would say in every case where you have the option?

JUROR GOUAZE: I would always vote for life imprisonment.

MR. MELSON: You would not vote for the death penalty?

JUROR GOUAZE: No.

MR. MELSON: Ms. Welch?

JUROR WELCH: I would not vote for the death penalty.

MR. MELSON: Under any circumstances?

JUROR WELCH: Right.

MR. MELSON: And Ms. Bishop?

JUROR BISHOP: State the question again?

MR. MELSON: Is your objection to the death penalty so absolute that you would not under any circumstances vote to impose the death penalty?

JUROR BISHOP: No.

MR. MELSON: Can you conceive of some circumstances in which you would impose the death penalty?

JUROR BISHOP: Yes.

MR. MELSON: Mr. Kelly?

JUROR KELLY: I'm totally against the death penalty

under the criminal justice system. I'm totally opposed to it in any situation.

MR. MELSON: Absolutely?

JUROR KELLY: Absolutely.

THE COURT: Does that mean, Mr. Kelly, you would not personally vote to impose it no matter what the circumstances of the case is?

JUROR KELLY: That's right, Your Honor.

MR. MELSON: Ms. Lesse?

JUROR LESSE: My objection is absolute.

MR. MELSON: Your Honor, perhaps we can make our motions now to strike for cause for those jurors, so that I can inquire of the others some other questions. I think we have: Mr. Loucas, Mary Gray, Mrs. Matticole, Mrs. Gouaze, Anne Welch and Matthew Kelly and Miss Lesse.

THE COURT: The motion is granted and the following jurors are excused and I thank you very much, ladies and gentlemen, for remaining with us through this time and you are excused subject to the usual telephone call that tells you when you are next needed. That will be: Mr. Loucas, Miss Gray, Miss Gouaze, Miss Matticole, Miss Lesse, Mr. Kelly and Mrs. Welch. You all are excused.

Now, would the three jurors in the front now take

picture of the left side of the face.

(The photograph previously marked for identification as Commonwealth's Exhibit No. 103 was received in evidence.)

THE COURT: Call the jury, please.

(Whereupon, the jury returned to the jury box.)

THE COURT: Members of the jury, I shall now read you the instructions which will be given you to cover the single determination which the jury must now make, which is what penalty shall be imposed. There are but two instructions and they will as before be given to you in writing to take with you into the jury room. The Commonwealth will have the right to open and close argument on this point as heretofore because the Commonwealth again has the burden of proof beyond a reasonable doubt. After that, we will ask you to retire and deliberate on your verdict as to the penalty, which again must be unanimous.

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to life imprisonment. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the two

following alternatives. Number one, that after consideration of his prior history or the circumstances surrounding the commission of this murder, there is a probability that he would commit criminal acts of violence that would constitute a continuing, serious threat to society or, two, that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhumane in that it involved deprivity of mind or aggrevated battery to the victim. If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives, then you may fix the punishment of the defendant at death, or, if you believe from all of the evidence, that the death penalty is not justified, that you shall fix the punishment of the defendant at life imprisonment. If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment.

An aggrevated battery, in quotation marks, "is an act of violent injury to the person of another which is more than the minimum necessary to accomplish an act of murder. It implies blows which in the light of surrounding circumstances are both more numerous and more violent than would have been necessary to accomplish the killing."